TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1910.

No. 14.

WINSLOW HART REAVES, SECOND LIEUTENANT, ARTILLERY CORPS, U. S. ARMY, PLAINTIFF IN ERROR,

vs.

FREDERICK C. AINSWORTH, MAJOR GENERAL, MILITARY SECRETARY, U. S. ARMY, AND WILLIAM H. TAFT, SECRETARY OF WAR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 24, 1910.

(21,236.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 184.

WINSLOW HART REAVES, SECOND LIEUTENANT, ARTILLERY CORPS, U. S. ARMY, PLAINTIFF IN ERROR,

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FREDERICK C. AINSWORTH, MAJOR GENERAL, MILITARY SECRETARY, U. S. ARMY, AND WILLIAM H. TAFT, SECRETARY OF WAR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 12, 1909.

1 In the Court of Appeals of the District of Columbia.

No. 1659.

WINSLOW HART REAVES, Second Lieutenant, &c., Appellant,
vs.
FREDERICK C. AINSWORTH, Major General, &c., et al.

Supreme Court of the District of Columbia.

No. 48002. At Law.

In the Matter of the Petition of WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S. Army, for a Writ of Certiorari to Review the Proceedings of a Board of Examination Convened by Special Orders # 111, War Department, May 13, 1905, and Special Orders Amendatory Thereto, and Special Orders No. 213, Based upon the Records of said Board, All of Which are in the Custody of General Frederick C. Ainsworth, Military Secretary, U. S. Army.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to-wit:—

Petition.

Filed October 6, 1905.

Supreme Court of the District of Columbia.

No. 48002.

In the Matter of the Petition of WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S. Army, for a Writ of Certiorari to Review the Proceedings of a Board of Examination Convened by Special Orders # 111, War Department, May 13, 1905, and Special Orders Amendatory Thereto, and Special Orders No. 213, Based upon the Records of said Board, All of Which are in the Custody of General Frederick C. Ainsworth, Military Secretary, U. S. Army.

The petitioner respectfully shows to this Court as follows:

I. That he was, until the 14th day of September, 1905, a second lieutenant of the Artillery Corps, U. S. Army, and was there-
2 tofore ordered to appear before a Board of Examination for promotion, convened by Special Orders # 111, 115 and 186,

copies of which are hereto annexed and made part hereof and marked Exhibits "A," "B" and "C" respectively.

II. Petitioner was commissioned in the regular Army of the United States on the 20th day of February, 1902; and in April, 1902, went to the Philippine Islands where he performed a continuous and very arduous service until August, 1903, when he was ordered to duty in the United States. Before said service in the Regular Army, petitioner was a first lieutenant in the U. S. Volunteers from May 10, 1898, to January 31, 1899, inclusive.

During such service at Manila, Philippine Islands, besides performing many regular duties, he acted as Judge Advocate, and as such, tried about one hundred cases; and while trying the case of Capt. Carl F. Hartmen, U. S. A., and after the fourth week of such trial, petitioner broke down in health and was a week in bed, and thereafter the trial was renewed. From that time until now, petitioner has been continually suffering from the effects of the climate and overwork in the Philippines; and for the last two years, has been suffering from an extremely acute case of cerebral neurasthenia or nervous exhaustion, from which he is still suffering.

Since petitioner's return to the United States, he has been almost continuously under the care of physicians, some of whom are the most famous in the world, as specialists for nervous diseases; and while petitioner's condition has improved while under the skillful treatment of Dr. S. Weir Mitchell, of Philadelphia, the circumstances hereinafter noted have so interfered with his recovery that he is today in as bad a condition as at any time during the last two years, and is wholly unable to exercise mental effort; his memory is at times a blank; and it is, and for two years has been, utterly impossible for petitioner to study, read or think consecutively, except for a few moments at a time, and petitioner's sleep has not averaged more than about two and one half hours per day.

III. While petitioner was on sick leave, he was ordered to appear before a Board of Examination to convene at Fort Monroe, Virginia, on August 16th, 1904; before which Board he made the following certificate:

"I certify, to the best of my knowledge and belief, that I am suffering from what is known as Neurasthenia (Nervous Prostration), insomnia, and melancholia; also a lack of mental strength, mental balance and mental vigor. Otherwise, no disability is known to exist.

(Signed) W. H. REAVES,
2nd Lieut., Artillery Corps.

The surgeons on said Board made a report that your petitioner was "free from any physical defect which would interfere with the performance of his duties as a first lieutenant of Artillery," although both of the surgeons on said board had previously certified otherwise, *i. e.*, Major Rafferty, as follows:

3 "2nd Indorsement.

"OFFICE OF THE SURGEON, HOSPITAL,
"FORT MONROE, VA., *May* 3, 1904.

"Respectfully returned to the adjutant, Artillery School, Fort Monroe, Va.

"Lieut. Reaves has insomnia, melancholia and extreme nervous excitability, due, it is believed, to overwork at his studies. He will make a more rapid recovery if entirely removed from his present surroundings and given a leave of from seven days to a month. He proposed to spend his time at Fort Hamilton, New York, where he may be under the observation of a medical officer. * * *

(Signed) OGDEN RAFFERTY,
Major & Surgeon, U. S. Army,
"Surgeon."

Dr. Charles H. Stearns, the other member of the Board, certified on March 22, 24, 1904, that petitioner was suffering from "insomnia, acute, result of overwork in Artillery School at Post," and during the four days that petitioner was at Fort Monroe to take said examination, said Dr. Stearns came to see petitioner twice daily, gave strong hypnotics, and furnished an attendant night and day.

No mental examination was then taken (on the recommendation of Surgeon Rafferty and others), and petitioner was allowed to return to Fort Hamilton, N. Y., but petitioner (though still on sick leave and unimproved) was again ordered to Fort Monroe for examination before the same Board, on October 5, 1904, when he was forced to take the mental examination although Dr. Percy L. Jones, the Port Surgeon, had to visit petitioner twice daily, and kept an attendant constantly with petitioner, night and day, and constantly administered bromides. Your petitioner broke down completely and thereafter was unable to do more than go through the form of an examination, doing little more than sign blank papers, and petitioner was found deficient.

Petitioner then consulted Dr. John A. Wyeth, of New York, who recommended him to consult the eminent nerve specialist, Dr. S. Weir Mitchell, of Philadelphia. Petitioner then put himself under the care of Dr. Mitchell, in a sanitarium in Philadelphia, from December 7th, 1904, until May 22nd, 1905, when he was again ordered to appear before another Board for re-examination, conveyed by said Special Orders # 111 (Exhibits A and B hereof) which Board convened at Fort Monroe, Virginia, on the 23d of May, 1905. Petitioner appeared before the Examining Board conveyed by Exhibits A and B, on the 23d day of May, 1905, submitted an affidavit of Dr. S. Weir Mitchell and his son, Dr. John K. Mitchell, a copy of which is hereto annexed, and made part hereof, marked Exhibit "D."

There was also presented to said Examining Board by the War Department a large number of certificates of doctors and others, under whose observation petitioner had been, from time to
4 time, during many months, and they were substantially all to the effect that he was suffering from a severe case of neuras-

thenia. The surgeons on said Board of Examination, having before them all the papers and documents received from the War Department, and the said affidavit Exhibit D, reported to the Board that your petitioner was suffering from nervous exhaustion; was physically incapacitated for service; and that his disability was due to neurasthenia contracted in the line of duty. Thereupon, the whole Board went into Executive session, and petitioner alleges on information and belief that they made a report substantially as follows:

"The Board is of the opinion that 2nd Lieut. W. H. Reaves, Artillery Corps, U. S. Army, is physically incapacitated for service. His disability is due to cerebral neurasthenia, and was contracted in the line of duty."

Thereupon petitioner was discharged from further attendance upon said Board of Examination, and the proceedings of said Board were forwarded to the War Department in Washington.

IV. Petitioner alleges that said Board of Examination was convened pursuant to and under the provisions of an Act of Congress passed October 1st, 1890, the material part of which Act is as follows:

"§ 3. That the President be, and he is hereby authorized to prescribe a system of examination of all officers of the army below the rank of Major to determine their fitness for promotion, and such an examination to be conducted at such times anterior to the accruing of the right to promotion as may be best for the interests of the service. * * * *And provided* that should an officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in the line of duty he shall be retired with the rank to which his seniority entitled him to be promoted * * * ; and no act now in force shall be so construed as to limit or restrict the retirement of officers as herein provided for."

Petitioner alleges that under said Act of Congress and the action of said Board of Examination finding your petitioner physically disqualified owing to cerebral neurasthenia contracted in the line of duty, your petitioner was thereupon, *ipso facto*, by virtue of the requirement of said Act of Congress retired with the rank of 1st Lieutenant of Artillery; that petitioner's right to such retirement became absolute at once, and no authority is vested by law or otherwise in the President of the United States or any other person, court or body to nullify said Act of Congress, and petitioner's right to such retirement thereupon became absolute.

V. Notwithstanding said mandatory clause of said Act of Congress, and the findings of said Board of Examination, your petitioner was not retired, but was ordered to report to the hospital at Fort McPherson, Atlanta, Georgia, about a thousand miles distant from his post at Fort Adams, Rhode Island, at a time of year, in a climate, and in circumstances that were wholly prejudicial to petitioner's health. Said hospital was under the direction of Dr. H. P. Birmingham, Surgeon, U. S. Army,—an army physician who has had no special training in nervous diseases and whose habits
5 petitioner knows to be such as to make him wholly unfitted to judge of nervous conditions. Said hospital was wholly un-

fitted for the treatment of neurasthenia, and the highly scientific and helpful treatment which your petitioner had been following at Philadelphia was wholly reversed, and petitioner's condition became radically worse.

Petitioner arrived at said hospital on the 22nd day of June 1905, and remained there until August 19, 1905. For about one month Dr. Birmingham saw petitioner for not longer than two or three minutes per day, and after the expiration of said month, did not see him but once thereafter, viz: August 15th, 1905.

While at said hospital petitioner had two attendants, one for the night and one for the day, and such attendants turned in to Dr. Birmingham official reports of petitioner's condition; and petitioner alleges on information and belief that these reports show that he had an average of about two and one-half hours' sleep per day of twenty-four hours, interrupted into about five periods, and that all the details of these official reports, together with occasional examinations of the urine of petitioner (wherein the specific gravity was never more than 1.015—1.020 being normal) indicate that your petitioner was still suffering from cerebral neurasthenia in its worst form, melancholia, insomnia, spells of weeping and fainting, and other prominent and well-known symptoms of nervous exhaustion. Nevertheless, petitioner alleges on information and belief that within about one week after he had arrived at said hospital, Dr. Birmingham reported to the Post Adjutant that petitioner was well, and shortly thereafter, recommended that he be returned to duty; and thereupon the Post Commander of Fort McPherson declined to accept petitioner for duty on the ground that the recommendation of Dr. Birmingham was preposterous, and stated to petitioner that he should apply for a year's leave of absence.

Petitioner alleges, on information and belief, that said reports of Dr. Birmingham are wholly untrue and are not based upon any personal observations by the Doctor himself, and are exactly contrary to the facts set forth in the official reports of the attendants made daily to Dr. Birmingham and now in Dr. Birmingham's possession.

VI. Thereafter petitioner was ordered to appear before the same Examining Board convened by Special Orders # 111 (Exhibit "A"), but changed as to a majority of the members (see Exhibit "C"), the two doctors being relieved and two other physicians, one taken from Washington and one from Fort Myer opposite Washington, were put in their place so that the Board, while nominally the same, was really composed of a majority of new members. This Board reconvened at Fort Monroe, Virginia, on August 21st, 1905, and petitioner appeared before it pursuant to orders.

VII. Petitioner introduced as his counsel Col. Alexander S. Bacon, a graduate of the U. S. Military Academy, at West Point, N. Y., and a former officer of the regular army, now a practicing attorney in the City of New York. The Board was duly or-
6 ganized, and had before it several large bundles of papers transmitted to the Board by the War Department, which said papers petitioner alleges on information and belief were the same

as those appearing before the Board at its former sessions on May 23d and 24th, 1905, with the addition of the reports of Dr. Birmingham, and possibly other papers.

Petitioner's counsel asked permission to inspect all papers before the Board, especially the reports of Dr. Birmingham, on the ground that these papers were evidence in the proceeding and were to be submitted to the surgeons of the Board as a guide to their examination of petitioner. He also asked permission to inspect the decision of this Board dated May 24th, 1905, and made several other motions, all of which will appear in the proceedings. All of these motions were denied, and petitioner was then examined again by the new surgeons of the Board, who made a report to the effect that petitioner was practically without any physical ailment and competent to do duty. A memorandum, annexed to their report, indicated that one examination of petitioner's urine was 1.025 and another, 1.015. Inasmuch as over fifty examinations of petitioner's urine have been had within the last two years, and in no instance has the specific gravity varied from 1.014 and 1.015, this last examination showing the abnormally high specific gravity of 1.025 is a patent error, and petitioner verily believes that said surgeons did not have the special knowledge necessary to make a correct examination for neurasthenia, and moreover a physical examination unaccompanied by extended observation of the patient, is never sufficient.

After said surgeons had made their report to the Board, petitioner's counsel made the following motions:

(1) "Counsel for Lieut. Reaves renews each motion and request made at the session of this Board August 21, 1905, and on the same grounds; he also

(2) "Moves the Board that he be permitted to inspect the report of the Surgeons of the Examining Board, dated May 24th, 1905, relating to Lieut. Reaves' physical condition;

(3) Also the report of said Examining Board of said date; and

(4) The reports of Dr. Birmingham relating to Lieut. Reaves's physical condition.

(5) "Counsel also moves that he be permitted to examine all papers submitted to this Board and the surgeons by the War Department or others, which said papers are now in bundles within sight of counsel, and have been used by the surgeons as an aid in forming the conclusions reported by them.

Requests 2, 3, 4 and 5 are made on the ground that the candidate has an absolute legal right to see all papers submitted to this Board and perused by the Surgeons (as these papers have been) as a foundation or aid to their decision herein, these papers being evidence before the Board and the Surgeons, the character of which the candidate has a right to know, and concerning which he has a right to cross-examine.

(6) "Counsel further moves that he be granted the privi-
7 lege of cross-examining both surgeons of the Board on their report to the Board just submitted.

(7) "On the ground that it is a strict legal right and on the further ground that neurasthenia is a disease that can only be rightly

diagnosed by observation. Lieut. Reaves moves that the following witnesses be called in his behalf, under whose observation he has been, from time to time, during the last two years, viz: (see list below).

(8) "Counsel moves that the official reports of the attendants on Lieut. Reaves's physical condition at the Hospital at Fort McPherson, and on which the reports of Dr. Birmingham are based, be produced before this Board;

(9) "Also all communications, official and private, passing between Dr. Birmingham and the War Department or any officer of the Army, and relating to the physical condition of Lieut. Reaves during the last four months.

(10) "Counsel moves to strike out the report of the Surgeons of this date on the ground that the report of the Examining Board, dated May 24th, 1905, is final, and Lieut. Reaves's retirement is mandatory under said report under the Act of Congress of October 1st, 1890."

"Counsel makes all of these requests on the ground hereinbefore set forth, and on the further ground that they are rights guaranteed under the Constitution and Laws of the United States, and the Army Regulations and Standing Orders, and a denial of any one of these requests would lead to a deprivation of Lieut. Reaves's rights of property without due process of law, and deprive him of the right to be confronted by and to cross-examine under oath the witnesses against him, substantially all of the papers submitted to the Surgeons and to this Board being unverified and *ex parte*.

IX. These motions were all denied by the Board, excepting the request to produce witnesses, and the Board requested Counsel to give a statement of what each proposed witness would swear to. Thereupon counsel produced before the Board a written statement containing the names of about thirty witnesses, about one-half of whom were physicians who had had petitioner under observation for different periods of time within the last two years, and all of whom could swear to facts—exact symptoms of petitioner's malady; besides, the physicians could give expert evidence as to petitioner's condition while under their observation. The following was counsel's statement:

"Complying with the request of the Board, counsel states that he expects to prove the following facts by the following witnesses, all of whom had Lieut. Reaves under personal observation from time to time, since his return from the Philippines in August, 1903, and each is expected to prove Lieut. Reaves' exact symptoms, and give expert evidence as to his physical condition, also mental, indicating that Lieut. Reaves is now and for two years last past has been
suffering from a severe case of nervous exhaustion and the
8 symptoms of which can only be determined from observation,
and not from a simple physical examination.

"The following persons had Lieut. Reaves under observation at the places mentioned at the time indicated:

Dr. James Kerr, Washington, D. C., Aug. 20 to Sept. 10, 1903.

Major R. W. Johnson, Surgeon, U. S. A., Fort Monroe, Va., Sept. 12 to Nov. 11, 1903.

Major J. L. Powell, Surgeon, U. S. A., Fort Hamilton, May 6 to Oct. 6, 1904.

Dr. George W. Adair, Contract Surgeon, U. S. A., Fort Hamilton, May 6 to June 15, 1904.

Dr. R. C. Stoney, Former Contract Surgeon, U. S. A., Fort Hamilton, June 16 to Aug. 1, 1904.

Dr. C. W. McMillan, Contract Surgeon, U. S. A., Fort Hamilton, Sept. 20 to Oct. 5, 1904.

Col. G. G. Greenough, Commanding Fort Hamilton, May 6 to Oct. 5, 1904.

Capt. George F. Landers, Artillery Corps, Fort Hamilton, May 6 to Oct. 5, 1904.

Mrs. Irene J. Clark, Fort Hamilton, housekeeper, May 5 to Oct 6, 1904.

Private W. M. Moody, Hospital Corps, Fort Monroe.

Capt. R. E. Noble, Asst. Surgeon, U. S. A., in Philippines and Washington, 1904.

Dr. J. A. Bayard Kane, Philadelphia, July, 1904, to June, 1905.

Dr. John A. Wyeth, New York, Sept. 27, 1904.

Dr. S. Weir Mitchell, Philadelphia, Dec. 7, 1904, to May 22, 1905.

Capt. Percy L. Jones, Asst. Surgeon, U. S. A., Fort Monroe, Oct. 1904 & May, 1905.

Maj. Henry A. Shaw, Surgeon, U. S. A., Fort Adams, Oct. 23, 1904 to June 20/05.

Dr. George W. Jean, Asst. Surgeon, U. S. A., Oct. 23, to —.

Dr. John K. Mitchell, Philadelphia, Pa., Dec. 7/04 to May 22/05.

Dr. W. B. St. John, Bristol, Tenn.

Col. H. O. S. Heistand, Military Secretary, U. S. A.

Captain B. C. Morse, Commanding Fort McPherson, Ga.

Major L. E. Goodier, Judge Advocate, U. S. A., Atlanta, Ga.

Sergeant Askew, Corporal Brown, Privates Rogers, Rourke, Russey, Ward, John J. Smith, Hospital Corps, Fort McPherson, Ga., June 22 to August 19, 1905.

Major H. P. Birmingham, Surgeon, U. S. A., Fort McPherson, June 22 to August 19, 1905.

Dr. Charles L. Dana, New York.

"Counsel states that he expects to prove by the officers and attendants above named, stationed at Fort McPherson, Ga., the contents of daily reports to Dr. Birmingham, whereby it appears that Lieut. Reaves' average sleep at Fort McPherson was 2½ hours in 24, and this broken on an average of 5 times; that he was for half of this time, and more, taking, to produce this sleep, such strong hypnotics as sodium bromide and chloral hydrate; that he had almost
9 daily crying spells, fainting spells, was afraid to walk out alone; that he neither read nor wrote because he was unable so to do; from his mental condition, that he had spells when he was uncontrollable and violent and was absolutely unable to take care *for* himself."

"And to prove further that Dr. Birmingham saw him for about

two minutes a day for about 1 month only, and was not in a condition to judge of Lieut. Reaves' nervous condition and that any reports of Dr. Birmingham which may state that Lieut. Reaves was competent to do duty were not based on facts or reports made to him by attendants, but were prepared negligently, ignorantly, wickedly and corruptly."

Said counsel also stated that he wished to review these reports of Dr. Birmingham and nullify their influence by producing the attendants, with their original official reports upon which Dr. Birmingham's reports should have been based.

The said Board refused to call any witnesses on the ground that the doctors named had already filed certificates that were before the Board, and that the laymen were not expert witnesses. They did not allege as a ground for this refusal, however, that the laymen could not testify to *facts* on which an expert could base an opinion. In short, petitioner was not allowed to call witnesses, nor to inspect exhibits presented to the Board, nor to cross-examine the surgeons on their report. All testimony, documentary or otherwise, was taken in secret. To all of which refusals, petitioner's counsel duly excepted.

Thereupon the Board went into Executive Session, and petitioner alleges, upon information and belief, that the Board formally reported, finding your petitioner to be without any physical disqualification, and competent to take the examination and do the duty of a 1st Lieutenant of Artillery. Thereupon petitioner was ordered to take such examination, and attempted to take the same, until prevented by spells of weeping and other marked symptoms of neurasthenia. Thereupon the Post Surgeon made a certificate as to petitioner's condition, and put him upon the sick report, and on the following day the surgeons of the Board were sent back to Fort Monroe from Washington, and superseded the Post Surgeon, and petitioner was forced to go through the farcical form of an examination under the personal supervision of the Board Surgeons, turning in practically blank examination papers, petitioner's mind being almost a blank.

Petitioner alleges that all proceedings under said Board of Examination, subsequent to the report of May 24th, 1905, wherein it found your petitioner incapacitated for service by reason of disability contracted in line of duty, are absolutely void and without authority of law, in that said report was final and could not be, and has not been set aside, reversed or revoked by any person or board, and your petitioner is entitled, as a matter of right, to be placed on the retired list of the United States Army under the express terms of the statute of October 1st, 1890.

Petitioner further alleges that all of the proceedings before
10 said Board on the 21st and 23rd days of August, 1905, were void for want of jurisdiction, were arbitrary, illegal, and in violation of every law of evidence and good morals and fair play. Petitioner was entitled by § 1253 of the U. S. Revised Statutes, "to a full and fair hearing," and to cross-examine the said surgeons as to all matters relating to their reports and the methods of deducing the same; was entitled, as a matter of right, to see and inspect all papers submitted to said surgeons and to said Board by the War Department as a means of aiding them in determining the result attained. These

Exhibits, especially the hostile reports of Dr. Birmingham, are in the nature of witnesses with which the petitioner was entitled to be confronted. The whole proceeding was a secret, star chamber affair, wholly hostile to American precedents and American ideas of Justice.

Petitioner alleges that his commission in the Army and his right to be retired on three-quarters pay during the rest of his life is property, and is protected under the 5th Amendment to the Constitution which declares that "no person shall * * * be deprived of life, liberty or property, without due process of law."

Petitioner alleges that all proceedings of said Board under exhibits A, B, C and E, are now in the custody of General Fred. C. Ainsworth, Military Secretary, at Washington, D. C.

Wherefore petitioner prays that a writ of certiorari may issue to bring up said Special Orders Nos. 111, 115, 186, and 213 (Exhibits A, B, C and E hereof), together with all records, evidence, exhibits, papers produced before said Board; the proceedings and all findings of said Board; and all actions thereon, and especially said reports of the Board dated May 24th, 1905, and August 23rd, 1905, and any and all actions had thereon, that they may be reviewed by this Court to the end that the findings of said Board on August 23rd, 1905, and said Special Orders No. 213 (Exhibit E), may be annulled, vacated and set aside, and your petitioner decreed to be placed upon the retired list of the United States Army under the express provisions of the Act of Congress approved October 1st, 1890, and the findings of said Board of Examination thereunder dated May 24th, 1905, if it shall be found that he be entitled to such relief, and that all proceedings of said Board, and of the Acting Secretary of War, subsequent to May 24th, 1905, be found to be void and without effect; and petitioner prays for such other, further or different order, decree or relief as may be just.

And your petitioner will ever pray, etc.,

WINSLOW HART REAVES,
Petitioner.

ALEXANDER S. BACON,
Of Counsel for Petitioner.

STATE OF NEW YORK, *County of New York, ss:*

Winslow Hart Reaves, being duly sworn, says: I am the petitioner in the above written petition, and have read the said petition, and the same is true of my own knowledge, except such matters as
11 there are therein stated on information and belief, and as to such statements, I believe it to be true.

WINSLOW HART REAVES.

Subscribed and sworn to before me this 25th day of September, 1905.

V. M. TURNER,
Notary Public, New York County.

[NOTARIAL SEAL.]

Supreme Court of the District of Columbia.

48002.

In the Matter of the Petition of WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S. Army, for a Writ of Certiorari to Review the Proceedings of a Board of Examination Convened by Special Orders # 111, War Department, May 13, 1905, and Special Orders Amendatory Thereto, and Special Orders No. 213, Based upon the Records of said Board, All of Which are in the Custody of General Frederick C. Ainsworth, Military Secretary, U. S. Army.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Alexander S. Bacon, being duly sworn, says that he is the attorney for Lieut. Winslow Hart Reaves, the petitioner herein, and appeared for him before the Board of Examination convened by Special Orders No. 111, etc., at Fort Monroe on May 23rd and 24th, 1905, and on August 21st and 23rd, 1905.

Deponent has known Lieut. Reaves for about one year, and from personal observation, and from numerous letters received from him—written or dictated by him—deponent verily believes that Lieut. Reaves has been, and still is, suffering from a severe case of nervous exhaustion that wholly unfits him for any duty or mental effort whatever.

Lieut. Reaves was first examined for promotion while on sick leave, and deponent verily believes that this examination did much to accentuate his disease. He failed on that examination, as a matter of course.

When ordered to Fort Monroe for re-examination in May, 1905, he was under Dr. Mitchell's treatment at Lakewood, N. J., improving slowly. To require such a re-examination at that time was, as deponent verily believes, almost a crime. The doctors on the Board found him physically disqualified in the line of duty; the full Board reported likewise (as is known from the fact that no mental examination was required), and it was supposed that, as a matter of course, he would be retired under the express mandate of the Act of October 1, 1890.

However, as deponent is informed and verily believes, Lieut. Reaves has an active and open enemy in Colonel Henry P. McCain, Assistant to the Military Secretary, and who has charge of all matters in that office relating to appointments, commissions and
12 promotions; said McCain wrote a letter to the Board that examined Lieut. Reaves for his original appointment in the Army, requesting the Board to find him disqualified, and to refuse him a commission in the Army. Said McCain has pursued him ever since. However, Mr. Reaves was recommended in writing by practically every member of the U. S. Senate and either in writing or orally by a majority of the members of the House of Representatives, besides a large number of governors of States and other well known citizens.

For some reason, easily suggested, Lieut. Reaves was not retired, as he should have been, under the law, when on said re-examination he was found physically disqualified by disease contracted in the line of duty, but he was sent to Fort McPherson, Atlanta, Ga., for observation, where, as deponent is advised and verily believes, every condition was what it should not have been—the climate, hospital, treatment, physician in charge,—everything; especially, the susceptibility of the Doctor to suggestions from headquarters. For this reason deponent asked, on the Examination, that all correspondence, official and private, between Dr. Birmingham and officers in Washington be produced.

Deponent verily believes that Dr. Birmingham's reports were made on suggestion from Washington, and were predetermined; that the two doctors on the Board of Examination were removed and two Washington doctors substituted, in order that a different report might be had; and that the reports of the hospital attendants at Fort McPherson indicated *facts* that were wholly different from the *opinions* expressed in the Birmingham reports, and upon which the report of August 23rd was largely based. The unverified opinion of Dr. Birmingham is not to be considered for one moment when opposed to the verified opinion of the Doctors Mitchell on any nervous disorder, or indeed on any subject. Deponent charges that the report of the Board of August 23rd, 1905, finding that Lieut. Reaves was all right, was predetermined, and was the result of a conspiracy that would have been revealed had deponent been permitted to cross-examine the two doctors on the Board and introduce evidence as to Lieut. Reaves' actual condition while at Fort McPherson during the last two months.

It is well known that neurasthenia is a disease, the diagnosis of which cannot be made by a single examination of the patient, but must be determined by observation for a long period. For this reason, doubtless, the unrevealed reports of Dr. Birmingham were obtained to supplement the examination of the doctors on August 23rd, and the *facts*, as revealed in the reports of attendants, were suppressed.

The hearings before the Board of Examination on August 21st and 23rd, 1905, were a farce. Counsel was useless, because he was not permitted to see the exhibits submitted to the Board for their direction or guidance; cross-examination of the surgeons was denied; witnesses were not called as requested by Lieut. Reaves; and the whole hearing was a secret, star chamber affair; the effect of which was to deprive Lieut. Reaves of his property (retired pay)
13 without due process of law, and the proceeding is wholly without precedent, unless it be in the case of People *ex rel.* Smith *vs.* Hoffman, 166 N. Y., 462, wherein the Court of Appeals of the State of New York reverses a similar proceeding, restoring Colonel Smith to duty; Lieut. Reaves has a property interest in his commission in a salary of $1400 per annum. On failure to pass this re-examination he has been dismissed from the service with one year's pay. On retirement for physical disabilities, he will receive three-quarters pay for life. He is deprived of this property by the illegal proceedings of the Board, guaranteed to him by the Constitution of

the United States, the Revised Statutes, the common law of the land, and every natural instinct for a "square deal."

At each hearing before each Board, Lieut. Reaves made the usual certificate, that he had neurasthenia and was not, physically or mentally, capacitated.

Deponent alleges, on information and belief, that Lieut. Reaves is a young man about thirty years of age; a graduate of the Masonic Institute of Hartsville, Tenn.; was one year at the University of Virginia; has held important and exacting political positions on the staff of the Governor of Tennessee, and in Washington, and at Manila was a most useful, efficient and overworked officer, receiving frequent commendations of his superiors in writing. Like so many serving in the debilitating climate of the Philippines, he suffered a mental and nervous breakdown, and is now a nervous wreck—To endure anything but a perfunctory examination for promotion—turning in practically blank papers—would probably be fatal, and for that reason deponent prepared a statement for Lieut. Reaves to file with the Board on August 25th, 1905, and the same was so filed, a copy of which is hereto annexed, marked Exhibit F. The mere form of a mental examination that he had to take was attended with great injury to his health.

The War Department has carefully suppressed the report of this Board, dated May 24th, 1905; it has been remarkably secretive about it, denying it to a Senator and a Congressman; deponent has not been able to get an official copy, neither has Congressman J. W. Gains, nor others who have sought to obtain it. Nevertheless, its general form is known from the prescribed forms in case of physical incapacity (in which case no mental examination is held, as was the case at the hearing in May, 1905) and deponent has heard of what the report consists.

Deponent verily believes that said report of May 24th, 1905, is final, under the Act of October 1st, 1890, and that Lieut. Reaves is entitled to retirement under that report, as a matter of absolute right, and he appeals to his rights under the Fifth Amendment to the Constitution and under said statute, and prays the Court that the illegal proceedings of said Board of August 21st and 23rd, 1903, be set aside; that said Special Orders No. 213 be declared null and void, and that he be placed on the retired list of the Army.

Deponent verily believes that all proceedings of said Board subsequent to the report of May 24th, 1905, are absolutely void and that said report was final under the express language of the Statute
14 which expressly deprives the President of any discretion in the matter; that the proceedings of said re-modeled Board on August 21st and 23rd were illegal, un-American and void; and that the Court should decree that said Board was without jurisdiction in its said proceedings on August 21st and 23rd, and that said proceedings were illegal in that they tended to deprive the petitioner of his property without due process of law in that he was not permitted to see Exhibits used against him nor to call or cross examine witnesses.

Deponent further says that he is an attorney and counselor at law, practicing in the Supreme Court of the State of New York, the

United States District Courts of New York and Brooklyn, for the Southern and Eastern Districts of New York, and the United States Supreme Court, and as Counsel for the petitioner above named, he has examined the proceedings in the foregoing petition mentioned, and has carefully enquired into all the matters set forth in said petition, and deponent verily believes that each and every allegation in said petition is true.

ALEXANDER S. BACON.

Sworn to before me this 25th day of September, 1905.

V. M. TURNER,

[NOTARIAL SEAL.] *Notary Public, New York County.*

EXHIBIT "A."

Filed October 6, 1905.

Special Orders No. 11.

WAR DEPARTMENT, *May 13th*, 1905.

Par. 5. A board of officers is appointed to meet at the call of the president thereof at Fort Monroe, Virginia, for the examination of such officers as may be ordered before it to determine their fitness for promotion.

Detail for the Board.

Major William C. Rafferty, Artillery Corps.
Captain Henry C. Davis, Artillery Corps.
Captain Johnson Hagood, Artillery Corps.
Captain Williard F. Truby, Assistant Surgeon.
1st. Lieut. Chandler P. Robbins, Assistant Surgeon.
1st. Lieut. Frederick W. Stopford, Artillery Corps, Recorder.
(1012801, M. S. O.)

15 EXHIBIT "B."

Filed October 6, 1905.

Special Orders No. 115.

WAR DEPARTMENT, *May 18th*, 1905.

Par. 4. First Lieutenant Percy L. Jones, Assistant Surgeon, is detailed as a member of the examining board appointed to meet at Fort Monroe, Virginia, May 23rd, 1905, by Paragraph 5, Special Orders No. 111, May 13th, 1905, War Department, vice Captain Willard F. Truby, Assistant Surgeon, hereby relieved.
(1014792)

EXHIBIT "C."

Filed October 6, 1905.

Special Orders No. 186.

WAR DEPARTMENT, *August 12th*, 1905.

Par. 7. Captain Francis N. Cooke, Artillery Corps; Major James D. Glennan, Surgeon, and Captain Carl R. Darnall, Assistant Surgeon, are detailed as members of the examining board at Fort Monroe, Virginia, appointed by Paragraph 5, Special Orders No. 111, May 13th, 1905, War Department, vice Captain Johnson Hagood, Artillery Corps, and Captain Percy L. Jones and 1st Lieutenant Chandler P. Robbins, assistant Surgeon, respectively, hereby relieved.

EXHIBIT D.

Filed October 6, 1905.

STATE OF PENNSYLVANIA,
City and County of Philadelphia:

S. Weir Mitchell, M. D., and John K. Mitchell, M. D., being duly severally sworn, says each for himself that Lieut. Winslow Hart Reaves has been under their medical observation from December 7, 1904, until now, having been about three months in the Infirmary for Nervous Diseases, 17- & Sumner Streets, Philadelphia, (and where they have many patients under treatment) and for about two months in Lakewood, N. J.

After nearly six months of medical care and of treatment we are able to state that Lieut. Reaves is still suffering from a severe case of nervous exhaustion and is wholly unfitted for any military duty. For him to now undergo the strain of examination for promotion would be attended with the most serious consequences. He is incapable of consecutive thought; his memory is defective; he
16 is subject to melancholia and nervous depression that unfit him for severe mental or physical effort. Having had much experience in prescribing for officers who have suffered from service in the tropics we believe that Lieut. Reaves' present condition is due to overwork while in the service in the Philippines in the line of duty.

He is not only unfitted for any military duty but will not be for an indefinite period. Nothing but isolation and freedom from every care can enable him to improve. He is slightly better since our former certificate was made on September 27, 1904, (when he was referred to us by John A. Wyeth, of New York, and Doctors Powell and Shaw, U. S. Army) but such improvement is not such as to warrant a belief in prompt recovery.

He has been and still is subject to insomnia and hysteria; he is

irritable and excitable; unable to concentrate his mind or attention on any subject; he is subject to fainting fits,—one within the last week; will weep and become extremely excitable in turn, and without any apparent cause. Indeed, he has symptoms of extreme nervous exhaustion.

Physically his condition was poor in certain respects when he first came to us. The blood examination showed a moderate degree of anæmia, although his appearance was fair; his muscles were soft and flabby; the heart action was too rapid; and the urine of low specific gravity and loaded with phosphates.

After our examination and opinion of September 27, 1904, Lieut. Reaves attempted an examination for promotion in October, 1904, and had a complete break-down in consequence. Such examination was unfortunate and never should have been taken.

He did not come into our hands for treatment until December 7, 1904. He was then put to bed with complete isolation and forbidden to attend to any business,—even to write the briefest letters or read a line in the newspapers,—in the hope of lessening his general nervous irritability, excitement and insomnia. He made so little improvement under treatment during the first three weeks that we were on the point of suggesting his leaving the Hospital and trying treatment in some other way, but then he began to improve, the sleeplessness grew better and the irritability of temper and brain lessened. He was kept in bed for a number of weeks, but even when he was much improved, the mere idea of work caused excitement again, and he grew emotional and distressed at the prospect of it. During the late winter he made more advance, but he had improved a good deal in physical condition before he began to show any signs of definite and settled nervous change.

It is our opinion that his improvement is dependent upon a continuance of the active physical life, most out of doors, which has been ordered for him. Although he is able now, having been brought to it by gradual degrees, to read a book or newspaper for an hour at a time in the day time, and for only one hour per day, more than this at present is hurtful and would most certainly retard his mental and nervous recovery. If he were at present under stress of mental work of any sort, we believe it would have a serious bad effect and postpone his improvement to a further date than we now
17 consider will probably see him well or nearly well, and ready to resume his responsibilities in the way of duty. He certainly is not now competent to undergo a mental examination or to do any military duty. His leave of absence, expiring June 3, 1905, should be extended another six months, or, better, he should be retired, that he may devote his entire time to the recovery of health.

S. WEIR MITCHELL.
JOHN K. MITCHELL.

Sworn to before me, this 22 day of May 1905.

EDGAR S. MAYNE,
Notary Public, Philadelphia, Pa.

EXHIBIT "E."

Filed October 6, 1905.

WAR DEPARTMENT, *September* 14, 1905.

Special Orders No. 213.

* * * * * * *

4. By direction of the President, 2d Lieutenant Winslow Hart Reaves, Artillery Corps, is honorably discharged from the service of the United States, under the provision of the Act of Congress, approved October 1, 1890, to take effect September 14, 1905. (1052959, M. S. O.)

By order of the acting Secretary of War,

J. C. BATES,
Major General, Acting Chief of Staff.

Official: F. C. AINSWORTH,
The Military Secretary.

EXHIBIT "F."

Filed October 6, 1905.

Counsel states that for most of the time for two years past, Lieutenant Reaves has had, on an average, but from two to three hours of broken sleep in any twenty-four hours, has suffered and still suffers from a severe case of Neurasthenia, and acting under the advice of Dr. S. Weir Mitchell, of Philadelphia, and other medical specialists, he has refrained from attempting to concentrate his mind to the extent of reading,—even of the newspapers,—for more than a year; and still acting under such advice,—that to take a long examination would lead to the most serious consequences,—he respectfully states that he can not safely take such examination and begs the Board to take action as if such examination had been taken and he found deficient in each subject.

(Endorsed:) Let the writ issue. Harry M. Clabaugh, Chief Justice.

18 *Writ of Certiorari.*

Supreme Court of the District of Columbia.

No. 48002.

In the Matter of the Petition of WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S. Army, for a Writ of Certiorari to Review the Proceedings of a Board of Examination Convened by Special Orders #111, War Department, May 13, 1905, and Special Orders Amendatory Thereto, and Special Orders No. 213, Based upon the Records of said Board, All of Which are in the Custody of General Frederick C. Ainsworth, Military Secretary, U. S. Army.

The President of the United States to the Respondent, Greeting:

To General Frederick C. Ainsworth, Military Secretary, Washington, D. C., custodian of the records and proceedings of a certain Board of Examination, convened by Special Orders Nos. 111, 115 and 186, dated War Department, May 13, May 18th and August 12th, 1905, respectively, and of which Major James D. Glennan, Surgeon, U. S. Army, was president, and of Special Orders No. 213, dated War Department, September 14, 1905, Greeting:

Being informed that there is now in your custody the proceedings and record of a Board of Examination before whom second lieutenant Winslow Hart Reaves, Artillery Corps, U. S. Army, was examined for promotion in the Army under the provisions of the Act of Congress, approved October 1st, 1890; and it appearing by the petition of said Winslow Hart Reaves, verified September 25th, 1905, and the affidavit of Alexander S. Bacon, verified September 25th, 1905, that said proceedings were in violation of law and in derogation of the rights of said Lieutenant Reaves under the Constitution of the United States, and that the records of said Board are illegal and that Special Orders No. 213, discharging said Reaves from the military service of the United States, based on said illegal proceedings, is absolutely void, the Board having no jurisdiction.

Therefore, we being willing, for certain reasons, that all proceedings concerning said examination, findings and reports, and order had under said Special Orders Nos. 111, 115, and 186, together with the evidence, exhibits and all things appertaining or relating thereto, had before you, should be certified and returned by you unto our Supreme Court of the District of Columbia, do hereby command you that you do make under your hand and annex to this writ a return with a transcript annexed, and certified by you, and a statement herein specified and required, and file the same in the office of the Clerk of this Court at Washington, D. C., within ten days after the date of the service of this writ upon you, all the proceedings concerning said examinations under said Orders had on the

19 23rd and 24th days of May, 1905, and on the 21st and 23rd days of August, 1905, had and taken by said Board of Ex-

amination, together with all and singular, the orders, with the proceedings, findings, reports and orders had and made by said Board thereon, and the disposition made by said Board thereon, with all and singular the testimony, evidence, exhibits, rulings, offers, motions, statements, writings, exceptions, decisions and proceedings by and before said Board had thereon on the said Examinations or proceedings, and the order of the acting Secretary of War, based thereon, and that you further certify and return your final decision and action in said matter, as fully and completely as the same was and is before you, and return this writ at the time and place aforesaid, to our said Court, with the manner in which you have executed the same, that our said Court may further act thereon as of right, and according to law, ought to be done, and your return thereto, with the transcript and statement as we have hereinbefore commanded you, and have you then and there this writ.

Witness the Honorable Harry M. Clabaugh, Chief Justice of said Court, the 6th day of October, A. D. 1905.

[SEAL.]

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN,
Ass't Cl'k.

Marshal's Return.

Served copy of within writ on Gen'l Fred'k C. Ainsworth, personally.

Oct. 7", 1905.

AULICK PALMER,
U. S. Marshal.

8.

Motion to Quash.

Filed October 27, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 48002.

In the Matter of the Petition of WINSLOW HART REAVES, Late Second Lieutenant, Artillery Corps, United States Army, for the Writ of Certiorari, etc.

Comes now the respondent, Fred. C. Ainsworth, Major General, Military Secretary, United States Army, and moves the court to quash the writ of certiorari issued herein, for the causes following:

1. Because the said writ was granted improvidently and upon an *ex parte* application.

2. Because the allowance of said writ in this case would be unjust and contrary to public policy.

20 3. Because the petition does not set up such a state of facts as entitles the petitioner to the issuance of the writ, for that,

(*a.*) Your respondent is not charged by law with the custody of the records, minutes, orders and findings and papers, of the proceedings of the Board of Examination sought to be reviewed and brought before this court, and is not the custodian thereof, nor is he charged in law with the duty to act or decide thereon.

(*b.*) The petition does not set up any right of property, title or interest in petitioner to any alleged office to which he is entitled.

(*c.*) Congress has entrusted to the Board of Examination, whose proceedings are sought to be reviewed herein, the decision of matters properly arising before it, and the said Board not being a judicial nor inferior tribunal, and Congress confiding therein, this court has no jurisdiction to interpose its function, or to issue a writ of certiorari to examine the proceedings of said Board.

4. And because the allowance of the writ of certiorari and the requirement of return thereto, would, in this case, operate to embarrass the operations of the military service of the United States, and would embarrass the proper administration of the manifold duties of the War Department and hinder its enforcement of its discipline and regulations, and the discharge of the legally ordained functions of this branch of government.

DANIEL W. BAKER,
United States Attorney in and for the District of Columbia, Attorney for Respondent.

Writ of Certiorari Quashed.

Supreme Court of the District of Columbia.

FRIDAY, *November 10th*, 1905.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

No. 48002. At Law.

In the Matter of the Petition of WINSLOW HART REAVES, Petitioner.

This cause came on to be heard upon the petition, the Writ of Certiorari issued thereon, the motion of respondent filed therein to quash said writ, and was argued and submitted to the Court. Thereupon, it is ordered (the question of discretion not being considered) that said motion be granted: Whereupon it is ordered that said writ of certiorari be, and is hereby quashed and for naught held, and the petition herein dismissed at the cost of petitioner.

21 *Order for Leave to Amend.*

Filed November 13, 1905.

Supreme Court of the District of Columbia.

No. 48002. At Law.

In the Matter of the Petition of WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S. Army, for a Writ of Certiorari to Review the Proceedings of a Board of Examination Convened by Special Orders # 111, War Department, May 13, 1905, and Special Orders Amendatory Thereto, and Special Orders No. 213, Based upon the Records of said Board, all of Which are in the Custody of General Frederick C. Ainsworth, Military Secretary, U. S. Army.

Now comes Alexander S. Bacon, attorney for the petitioner, Winslow Hart Reaves, and prays the Court for leave to amend the petition and writ of Certiorari, filed herein by incorporating in and adding to the title thereof, the words "and William H. Taft, as Secretary of War."

Dated, New York City, November 11, 1905.

ALEXANDER S. BACON,
Attorney for Petitioner.

37 Liberty Street, New York City.

Please take notice that the above notice will be called for hearing before Mr. Justice Harry M. Clabaugh, at the opening of the Court, at Washington, D. C., on Friday, November 17, 1905, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated, New York City, November 11, 1905.

Yours, &c., ALEXANDER S. BACON,
Attorney for Petitioner.

37 Liberty Street, New York City.

To Hon. Daniel W. Baker, Attorney for Respondent, District Attorney.

Leave to Amend Petition Granted.

Supreme Court of the District of Columbia.

SATURDAY, *November 20th*, 1905.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

22 At Law. No. 48002.

WINSLOW HART REAVES, Pet'r,
vs.
FREDERICK C. AINSWORTH, Respondent.

Upon consideration of the motion of petitioner filed herein for leave to amend, it is ordered that the same be, and is hereby granted. Whereupon, it is further ordered that the order of dismissal of the petition, heretofore entered herein be, and is hereby, vacated with leave to amend the petition herein, by adding thereto the name of the Secretary of War.

Amendment to Petition.

Filed December 7, 1905.

Supreme Court of the District of Columbia.

No. 48002.

In the Matter of the Petition of WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S. Army, for a Writ of Certiorari to Review the Proceedings of a Board of Examination Convened by Special Orders # 111, War Department, May 13, 1905, and Special Orders Amendatory Thereto, and Special Orders No. 213, Based upon the Records of said Board, All of Which are in the Custody of General Frederick C. Ainsworth, Military Secretary, U. S. Army.

Now comes the petitioner herein, by his attorney, Alexander S. Bacon, and by leave heretofore had and obtained, amends the original petition filed herein by incorporating therein the name of William H. Taft, as Secretary of War as one of the respondents.

Wherefore petitioner prays that an amended writ of certiorari may issue to both the respondents herein.

Dated, New York City, November 27, 1905.

ALEXANDER S. BACON,
Attorney for Petitioner.

37 Liberty Street, New York City.

23 *Amended Writ of Certiorari.*

Supreme Court of the District of Columbia.

No. 48002.

In the Matter of the Petition of WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S. Army, for a Writ of Certiorari to Review the Proceedings of a Board of Examination Convened by Special Orders # 111, War Department, May 13, 1905, and Special Orders Amendatory Thereto, and Special Orders No. 213, Based upon the Records of said Board, All of Which are in the Custody of General Frederick C. Ainsworth, Military Secretary, U. S. Army, and William H. Taft, Secretary of *State*.

The President of the United States to the Respondents, Greeting:

To General Frederick C. Ainsworth, Military Secretary, and William H. Taft, Secretary of War, Washington, D. C., custodians of the records and proceedings in a certain Board of Examination, convened by Special Orders No. 111, 115 and 186, dated War Department, May 13, May 18th and August 12th, 1905, respectively, and of which Major James D. Glennan, Surgeon U. S. Army, was president, and of Special Orders No. 213, dated War Department, September 14, 1905, Greeting:

Being informed that there is now in your custody the proceedings and record of a Board of Examination before whom Second Lieutenant Winslow Hart Reaves, Artillery Corps, U. S. Army, was examined for promotion in the Army under the provisions of the Act of Congress, approved October 1st, 1890; and it appearing by the petition of said Winslow Hart Reaves, verified September 25th, 1905, and the affidavit of Alexander S. Bacon, verified September 25th, 1905, that said proceedings were in violation of law and in derogation of the rights of said Lieutenant Reaves under the Constitution of the United States, and that the records of said Board are illegal and that Special Orders No. 213, discharging said Reaves from the military service of the United States, based on said illegal proceedings, is absolutely void, the Board having no jurisdiction,

Therefore, we being willing, for certain reasons, that the proceedings concerning said examination, findings and reports, and order, had under said Special Orders Nos. 111, 115 and 186, together with the evidence, exhibits and all things appertaining or relating thereto, had before you, should be certified and returned by you unto our Supreme Court of the District of Columbia, do hereby command you that you do make under your hands and annex to this writ a return with a transcript annexed, and certified by you, and a statement herein specified and required, and file the same in the office of the Clerk of this Court at Washington, D. C., within ten days after the date of the service of this writ upon you, all the proceedings concerning said examinations under said Orders had on the

24 23rd and 24th days of May, 1905, and on the 21st and 23rd days of August, 1905, had and taken by said Board of Ex-

amination, together with all and singular, the orders, with the proceedings, findings, reports and orders had and made by said Board thereon, and the disposition made by said Board thereon, with all and singular the testimony, evidence, exhibits, rulings, offers, motions, statements, writings, exceptions, decisions and proceedings by and before said Board had thereon on the said examinations or proceedings, and the order of the acting Secretary of War, based thereon, and that you further certify and return your final decision and action in said matter, as fully and completely as the same was and is before you, and return this writ at the time and place aforesaid, to our said Court, with the manner in which you have executed the same, that our said Court may further act thereon as of right, and according to law, ought to be done, and your return thereto, with the transcript and statement as we have hereinbefore commanded you, and have you then and there this writ.

Witness the Honorable Harry M. Clabaugh, Justice of said Court, the 7" day of December, 1905.

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN,
Ass't Clk.

[SEAL.]

Marshal's Return.

Served copy of within writ on General Frederick C. Ainsworth, Military Secretary, personally, Dec. 7, 1905, also served copy on William H. Taft, Secretary of War, personally, Dec. 8, 1905.

AULICK PALMER, *Marshal.*
S.

Motion to Supersede the Writ Issued on Amended Petition.

Filed December 18, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 48002.

In the Matter of the Petition of WINSLOW HART REAVES, Late Second Lieutenant, Artillery Corps, U. S. Army, for a Writ of Certiorari, etc.

Come now the respondents, Fred C. Ainsworth, Major General U. S. A., The Military Secretary, and William H. Taft, Secretary of War, and move the Court to supersede the writ of certiorari issued herein, for the causes following:

1. Because the said writ was granted improvidently, and upon *ex parte* application.

2. Because the allowance of said writ in this case would be unjust and contrary to public policy.

25 3. Because the amended petition does not set up such facts as entitle the petitioner to the issuance of the writ, for that:

(*a*) The petition does not set up any right of property, title or interest in petitioner to any alleged office to which he is entitled.

(*b*) Congress has entrusted to the Board of Examination whose proceedings are sought to be reviewed herein, the decision of matters properly arising before it, and the said Board not being a judicial or inferior tribunal, and Congress confiding therein, this Court has no jurisdiction to interpose its function, or to issue the writ of certiorari to examine the proceedings of said Board.

4. Because the allowance of the writ of certiorari and the requirement of return thereto, would, in this case, embarrass the operations of the military service of the United States, and would embarrass the proper administration of the manifold duties of the War Department, and hinder the enforcement of its discipline and regulations and the discharge of the legally ordained functions of this branch of the Government.

5. And because the record sought to be reviewed herein shows that the petitioner is not entitled to the issuance of the writ, as appears by a duly certified and true extract from said record filed herewith, and prayed to be read as a part hereof.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia, Attorney for Respondents.

Affidavit of Fred. C. Ainsworth.

Filed December 18, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 48002.

In the Matter of the Petition of WINSLOW HART REAVES, Late Second Lieutenant, Artillery Corps, U. S. Army, for a Writ of Certiorari, etc.

DISTRICT OF COLUMBIA, *ss:*

Fred C. Ainsworth, Major General, U. S. A., The Military Secretary, being first duly sworn, on oath says:

That he is one of the respondents named in the amended petition filed in the above-entitled cause, and that he has read over the motion to supersede the writ of certiorari, filed in said cause; that as The Military Secretary he has knowledge of the record of the petitioner sought to be reviewed herein, and that the certified extract from said record, appended hereto and filed herewith, is a true copy of such part of the said record as shows the concluding report of the board of officers convened by Special Orders 111, of its proceedings of May 23, 1905.

F. C. AINSWORTH.

26 Subscribed and sworn to before me this 18th day of December, A. D., 1905.

[SEAL.] EDWARD H. BOOTH,
Notary Public.

Filed December 18, 1905.

UNITED STATES OF AMERICA:

WAR DEPARTMENT,
WASHINGTON, *November* 16, 1905.

I hereby certify that the paper hereto attached is a true extract from the report of a board of officers convened by War Department orders of May 13, 1905, for the examination of Winslow H. Reaves, Artillery Corps, for promotion.

F. C. AINSWORTH,
Major-General, U. S. A., The Military Secretary.

Be it known that F. C. Ainsworth, who signed the foregoing certificate, is The Military Secretary of the Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof, I have hereunto set my hand, and caused the seal of the War department to be affixed, on this Sixteenth day of November, one thousand nine hundred and five.

[Seal of United States.]

ROBERT SHAW OLIVER,
Assistant Secretary of War.

Filed December 18, 1905.

The board is of opinion that 2nd Lieut. Winslow H. Reaves, Art'y Corps, is physically incapacitated for service at the present time, but that there is a reasonable hope of his recovery. Lieut. Reaves' present condition is such that it is not possible for him to proceed with the mental examination, without serious interference with his future recovery.

His disability is due to severe cerebral and cardio-vascular neurasthenia, contracted in line of duty.

Judgment, Appeal, &c.

Supreme Court of the District of Columbia.

WEDNESDAY, *February 7th*, 1906.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Associate Justice, presiding.

* * * * * * *

27 By Chief Justice Clabaugh.

In re WINSLOW HART REAVES, Petitioner, &c. No. 48002. At Law.

Upon consideration of the original and amended petitions for the writ of certiorari filed herein, and the motion of respondents to supersede the said writ, and now, before the return thereof, it appearing to the Court without considering the question of

discretion, that the said writ of certiorari has been improperly granted, it is, this 7th day of February, 1906; Ordered, that the said motion be, and the same hereby is, allowed, that the said writ of certiorari be, and the same hereby is, superseded and for naught held, and that the said original and amended petitions be, and they hereby are, dismissed, at the cost of petitioner.

From the aforegoing, the petitioner by his Attorney in open Court, notes an appeal to the Court of Appeals, and prays that bond be fixed; Whereupon, it is ordered that the petitioner furnish bond for costs herein, on such appeal with surety or sueties to be approved by this Court in the sum of One Hundred Dollars.

Memoranda.

February 19, 1906.—Leave to appellant to deposit $100 in lieu of appeal bond.

February 19, 1906.—$100.00 deposited by appellant in lieu of appeal bond.

Directions to Clerk for Preparation of Record.

Filed February 19, 1906.

In the Supreme Court of the District of Columbia.

48002. At Law.

In the Matter of the Petition of WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S. Army, for a Writ of Certiorari.

To Mr. John R. Young Clerk:

Please prepare a transcript of record on appeal to the Court of Appeals herein, and include therein the following:

1. Petition and Affidavit Filed Oct. 6, 1905.
2. Order of Court endorsed on said petition.
3. Writ of Certiorari issued Oct. 6, 1905.
4. Motion to quash filed Oct. 27, 1905.
5. Order of Court of Nov. 10, 1905.
6. Motion of petitioner Filed Nov. 13, 1905.
7. Order of Court of Dec. 18, 1905.
8. Amendment to petition.
9. Amended writ of Certiorari issued Dec. 7, 1905.

28 10. Motion to supersede Dec. 18, 1905.

11. Order of Court of Feb. 7, 1906.
12. Mem. as to deposit in lieu of bond.
13. And this order of instructions to Clerk.

ALEXANDER S. BACON,
Attorney for Appellant.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 50, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 48002 At Law, wherein Winslow Hart Reaves, Second Lieutenant, &c., is Petitioner, and Frederick C. Ainsworth, Major General, &c. et al., are Respondents, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 7″ day of March, A. D., 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1659. Winslow Hart Reaves, second lieutenant, &c., appellant, vs. Frederick C. Ainsworth, major general, &c., et al. Court of Appeals, District of Columbia. Filed Apr. 7, 1906. Henry W. Hodges, clerk.

29 TUESDAY, *May 1st, A. D.* 1906.

No. 1659.

WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S Army, Appellant,

vs.

FREDERICK C. AINSWORTH, Major General, Military Secretary, U. S. Army, and WILLIAM H. TAFT, Secretary of War.

The argument in the above entitled cause was commenced by Mr. A. S. Bacon, attorney for the appellant, and was continued by Messrs. Stuart McNamara and D. W. Baker, attorneys for the appellees, and was concluded by Mr. A. S. Bacon, attorney for the appellant.

30 No. 1659.

WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S. Army, Appellant,
vs.
FREDERICK C. AINSWORTH, Major General, Military Secretary, U. S. Army, and WILLIAM H. TAFT, Secretary of War.

Opinion.

[Mr. Justice DUELL delivered the opinion of the Court:]

This appeal is taken from an order of the Supreme Court of the District of Columbia granting appellees' motion to supersede a writ of certiorari granted *ex parte*, requiring appellees to produce in court certain special orders of the War Department, known as numbers one hundred and eleven, one hundred and fifteen, and one hundred and eighty-six, and all reports of proceedings had thereunder upon the examination of the appellant on the 23d and 24th days of May, 1905, and on the 21st and 23d days of August, 1905, by the board of examination convened by the said orders to determine his fitness for promotion in the regular army under the provisions of the act of Congress approved October 1, 1890.

This writ ran to the appellee, Ainsworth, the military secretary. A motion to quash the writ was filed, and the case came on for hearing upon the petition. The writ of certiorari issued thereon and the motion to quash said writ was argued and submitted to the court, with the result that the court (the question of discretion not being considered) granted the motion, holding that the writ of certiorari should be quashed and the petition dismissed.

The appellant three days later obtained leave from the court to amend his petition and the writ of certiorari by incorporating in and adding to the title thereof the words, "And William H. Taft as Secretary of War." The petition being amended and the amended writ of certiorari having been granted, appellees moved to supersede the writ upon the grounds that the writ was granted improvidently and upon *ex parte* application; that the allowance of the writ would be unjust and contrary to public policy; that the amended petition did not set up facts showing any right of property, title, or interest in petitioner to any alleged office to which he was entitled; that Congress had entrusted to the board of examination, whose proceedings were sought to be reviewed, the decision of matters properly arising before it, and that said board not being a judicial or inferior tribunal, the court had no jurisdiction to interpose its functions nor to issue the writ of certiorari to examine its proceedings; that the allowance of the writ and the requirement of a return thereto would embarrass the operations of the military service of the United States and the proper administration of the duties of the War Department, and hinder the enforcement of its discipline and regulations and the discharge of the legally ordained functions of that branch of the Government; and that the record sought to be reviewed showed that the petitioner was not entitled to the issuance of the writ, as appeared

by a true extract from said record filed therewith. Accompanying the motion to supersede there was filed the affidavit of the appellee, Ainsworth, setting forth that an extract from the record, appended thereto and filed therewith, was a true copy of such part of the record as shows the concluding report of the board of officers convened by special order one hundred and eleven in its proceedings of May 23, 1905.

The court, proceeding to the consideration of the original and amended petitions for the writ of certiorari and the motion to supersede the writ, before the return thereof, ordered (without considering the question of discretion) that the writ of certiorari had been improperly granted and that therefore it should be superseded, and that the original and amended petitions be dismissed.

The petition upon which the writ was granted set forth that until September 14, 1905, the petitioner, Reaves, was Second Lieutenant of the Artillery Corps, United States Army, and was ordered to appear before a board of examination for promotion, convened by special orders numbers one hundred and eleven, one hundred and fifteen, and one hundred and eighty-six; that he was commissioned in the regular army February 20, 1902.

In view of the conclusion to which we have arrived it is unnecessary to here set forth the voluminous allegations of the petition filed by the appellant, for we are met at the threshold by the question of jurisdiction—the power of the Supreme Court of the District of Columbia to issue a writ of certiorari to review the proceedings of the board of examination whose action is here complained of. This board is one created under the authority vested in the President by the act of October 1, 1890 (26 Stat., 562). Section 3 of the act says:

"That the President be and he hereby is authorized to prescribe a system of examination of all officers of the army below the rank of major to determine their fitness for promotion, such examination to be conducted at such times anterior to the accruing of the right to promotion as may be best for the interest of the service. * * * That if any officer fails to pass a satisfactory examination and is reported unfit for promotion, the officer next below him in rank shall receive the promotion; and provided that should the officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in line of duty, he shall be retired with the rank to which his seniority entitled him to be
31 promoted, but if he should fail for any other reason, he shall be suspended from promotion for one year, when he shall be reexamined, and in case of failure on such reexamination, he shall be honorably discharged with one year's pay from the army."

The alleged lack of jurisdiction is founded on the thory that this board is not a judicial or inferior tribunal, but a special tribunal created under the power vested in the President by Congress, and that Congress did not intend to have the proceedings had under said statute reviewable by the courts, and so made no provision therefor. Section 3 of the act has not, to our knowledge, been the subject of interpretation by the courts, though it has been referred by the Secretary of War to the Attorney-General for his consideration and opin-

ion upon one point (21 Opinions Atty. Gen., 385). The Attorney-General held that an officer could not be retired by a board of examination without the approval by the President of its finding.

That Congress acted within its constitutional powers when it enacted the statute in question is undoubted. "By article 1, section 8, of the Constitution, Congress has power 'to raise and support armies;' 'to make rules for the Government of the land and naval forces.' * * * Congress is thus expressly vested with the power to make rules for the government of the whole regular army and navy at all times." Johnson v. Sayre, 158 U. S., 109. It is equally true that "all persons in the military or naval service of the United States are subject to the military law." Johnson v. Sayre, supra.

Congress having constitutional authority to provide for the government of the army, did, by section 3 of the act of October 1, 1890, give to the President certain powers relating to the promotion, and indirectly to the retirement of officers of the army, and this appellant being an officer of the army was amenable to such statute. If Congress had the power to provide a system of examinations for promotion, and as an incident thereto for the retirement of officers ordered before said boards of examination, we are of the opinion that it had the power to provide that the acts of the President under authority given him should be final and not directly reviewable by the courts.

"Congress alone has the power to determine whether the judgment of a court of the United States, of competent jurisdiction, shall be reviewed or not. If it fails to provide for such a review, the judgment stands as the judgment of the court of last resort, and settles finally the rights of the parties which are involved." We see no valid reason why Congress may not determine in reference to tribunals of competent jurisdiction to be instituted for determining questions relating to the personnel of the army and navy, that their decisions, when made final by the approval of the President, shall not be reviewable through the means of a writ of certiorari.

The statute in terms gives no right of review, and, when we take into consideration the nature of the subject it was legislating upon, many reasons present themselves why such review would, on the whole, be impolitic and have a tendency to embarrass the discipline of the army. If one officer, dissatisfied with the decision of an examining board, has a right to ask to have the proceedings of the board reviewed by means of a writ of certiorari, then, of course, all others have. This, it would seem, might soon lead to a demoralization of that branch of the military service.

"When the law confided to a special tribunal authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal within the scope of its authority is conclusive upon all others." Johnson v. Towsley, 13 Wall., 72, 83.

Nor is there anything in the statute, as we read it, which even indirectly suggests that Congress intended to authorize the courts by writs of certiorari to review the acts of the President done under it. The acts of these examining boards not being final, but subject to the approval or disapproval of the President, they are in effect the acts of the President. It is not to be presumed that Congress con-

sidered that the decisions of the President, when called upon to exercise judgment and discretion in the performance of duties devolved upon him, should be reviewable. That discretion and judgment was confided in the executive branch of the Government by the act of Congress in question, and that it had to be exercised by the board of examination, and by the President in approving of any finding the board might make, is too plain for argument. As was said by Chief Justice Alvey, speaking for the court, in Edwards v. Root, 22 App. D. C., 419: "To interpose in any such case would almost certainly be productive of mischief and confusion in the entire organization. It is a well-settled principle in our jurisprudence and polity of government that the courts can not substitute their own discretion and judgment for that of the executive departments of the Government in matters properly confided to it. Each department of Government must work in its own proper sphere and jurisdiction." 31 Wash. Law Rep., 679.

In the case at bar the board was military in character. It had jurisdiction of the subject-matter and of the person. To review its decision, approved as it was by the President, and in the form sought, would be to establish a most unwise precedent. In Smith v. Whitney, 116 U. S., 167, which was a case where the Supreme Court of the District of Columbia at general term had held that it had no jurisdiction to entertain a petition, filed by a naval officer for a writ of prohibition to the Secretary of the Navy, and to a court-martial convened to try him and had therefore dismissed it, the Supreme Court did not consider it necessary to decide as to the power of the court to issue the writ because no case was shown for the exercise of it. The court, however, did say, "The Secretary of the Navy being an executive officer, and not a member of the court-martial sought to be prohibited, it is quite clear that his acts concerning the petitioner can not be the subject of a writ of prohibition. * * * And this court, although the question of issuing a writ of prohibition to a court-martial has not come before it for direct adjudication, has repeatedly recognized the general rule that the acts of a court-martial, within the scope of its jurisdiction and duty, can not be controlled or reviewed in the civil courts by writ of prohibition or otherwise." While recognizing that a board of examination is not the same as a court-martial, and that a writ of prohibition is quite different from a writ of certiorari, nevertheless we are of the opinion that the decision of the latter should not be reviewed by the United States courts, by writs of certiorari, when it acts within the scope of its authority. That the board of examination acted within the scope of its authority we think is shown by that part of the record referred to in the affidavit of appellee Ainsworth. This shows that the board at its session of May 23, 1905, did not find that appellant was permanently physically incapacitated for service, but only that he was *at that time* and that there was a *reasonable hope of his recovery*. Furthermore it is not alleged that any report of the proceedings of that session was made to the President, or that any order was presented for his approval or disapproval. This being so we are of the opinion that that board, or another, might thereafter be lawfully

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convened and appellant sent before it for examination. There is nothing in the section of the act which indicates that Congress intended that should an officer be found by an examining board to be temporarily incapacitated for service by reason of physical disability contracted in line of duty that he should not at a later date or dates be called before one of these boards for further examination or examinations. Until the President shall approve a finding of one of these boards retiring an officer, the question of further examination, we think, lies within the judgment and discretion of the President and those acting for him. We are therefore of the opinion that the appellant was properly before the board in August, 1905, and that the board had jurisdiceion in the premises, and it does not appear that appellant then and there raised the question of jurisdiction. Conceding that the proceedings of the board in August, 1905, were as arbitrary and irregular as alleged, we must bear in mind that its members were presumably not familiar with the niceties of the forms of law, but as we are not considering the merits of the case, other than to determine the question of the jurisdiction of the board, it is unnecessary to comment upon the acts of the board.

We have examined the case of People ex rel. Smith v. Hoffman, 166 N. Y., 462, much relied on by appellant's counsel. In that case it was held that a writ of certiorari not being prohibited under section 2120 of the New York Code of Civil Procedure, or by the military code, was a proper proceeding by which to review a decision of a board of examination having before it a member of the State militia. While the decisions of the Court of Appeals of the State of New York are entitled to the highest consideration, they are of course not controlling in this jurisdiction, and, where, as in the present case, the facts are different, we can not presume that had they this case to pass upon they would hold that a writ of certiorari would lie to review the decision of an examining board created under authority granted to the President by Congress. We think that the court recognized in their decision a distinction where the "subject is treated with reference to the standing army rather than the militia of the various States." At all events we think there is a marked difference. Where a man enlists in the regular army of the United States " his relations to the State and the public are changed." As said in *In re* Grimley, 137 U. S., 147, 153: "While our regular army is small compared with those of European nations, yet its vigor and efficiency are equally important. An army is not a deliberative body. It is the executive arm. Its law is that of obedience." If officers dissatisfied with the decisions of army or navy boards before whom they are legally summoned are to be permitted to have a court's review of such decisions it will not be long before a state of demoralization will exist, the effects of which will be far-reaching. In civil matters the courts have been slow to review the acts of executive officers acting within their jurisdiction in matters requiring the exercise of judgment and discretion. They should be, and we think they have been, equally slow in setting up their judgment against that of tribunals provided by law for regulating matters, authorized to be passed upon by military tribunals, composed of military or naval officers who are espe-

cially fitted by their training and experience to determine the questions submitted to them. As as has been said, "it would therefore be most illogical, to say nothing of the impediments to military discipline which would thereby be interposed, to apply to the proceedings of court-martials" (or similar tribunals) "those rules which are applicable to another and different course of practice."

Being of the opinion that the Supreme Court of the District of Columbia was without jurisdiction to grant a writ of certiorari to review the proceedings of the board of examination referred to in the petition it follows that its decision suspending the writ of certiorari and dismissing the original and amended petitions should be, and it is hereby, affirmed.

Affirmed.

33 FRIDAY, *June 15th, A. D.* 1906.

No. 1659, April Term, 1906.

WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S. Army, Appellant,
vs.
FREDERICK C. AINSWORTH, Major General, Military Secretary, U. S. Army, and WILLIAM H. TAFT, Secretary of War.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE DUELL,
June 15, 1906.

THURSDAY, *June 11th, A. D.* 1908.

No. 1659.

WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S. Army, Appellant,
vs.
FREDERICK C. AINSWORTH, Major General, Military Secretary, U. S. Army, and WILLIAM H. TAFT, Secretary of War.

On motion of Mr. F. J. Hogan, on behalf of counsel for the appellant, it is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States, issue, and the bond for costs is fixed at the sum of three hundred dollars.

34 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Winslow Hart Reaves, Second Lieutenant, Artillery Corps, U. S. Army, Appellant, and Frederick C. Ainsworth, Major General, Military Secretary, U. S. Army, and William H. Taft, Secretary of War, a manifest error hath happened, to the great damage of the said Appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of June, in the year of our Lord one thousand nine hundred and eight.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

35 (*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Winslow Hart Reaves, as principal, and The United States Fidelity and Guarant*t* Company, a corporation of the State of Maryland, as surety, are held and firmly bound unto Frederick C. Ainsworth and William H. Taft in the full and just sum of Three Hundred ($300.00) Dollars to be paid to the said Frederick C. Ainsworth and William H. Taft, their certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 15th day of June, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Winslow Hart Reaves, Second Lieutenant Artillery Corps, U. S. Army, appellant, and Frederick C. Ainsworth, Major General, Military Secretary and William H. Taft, Secretary of War, a judgment was rendered against

the said Winslow Hart Reaves and the said Winslow Hart Reaves having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Frederick C. Ainsworth and William H. Taft citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Winslow Hart Reaves shall prosecute said writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WINSLOW HART REAVES, [SEAL.]
By ALEX S. BACON, *Att'y.*
THE UNITED STATES FIDELITY AND GUARANTY CO., [SEAL.]
By LEE B. MOSHER, *Attorney in Fact.*

Sealed and delivered in the presence of—
——— ———.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1659. Winslow Hart Reaves, Second Lieutenant, Artillery Corps, U. S. Army, Appellant, v. Frederick C. Ainsworth, Major General, Military Secretary, U. S. Army and William H. Taft, Secretary of War. Bond on Writ of Error to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed Jun- 15, 1908. Henry W. Hodges, Clerk.

36 UNITED STATES OF AMERICA, *ss:*

To Frederick C. Ainsworth, Major General, Military Secretary, U. S. Army, and William H. Taft, Secretary of War, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Winslow Hart Reaves, Second Lieutenant, Artillery Corps, U. S. Army, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 15th day of June, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 15th day of June, A. D. 1908.

DANIEL W. BAKER, *U. S. Att'y.*
STUART McNAMARA.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-15, 1908. Henry W. Hodges, Clerk.

37 Court of Appeals of the District of Columbia.

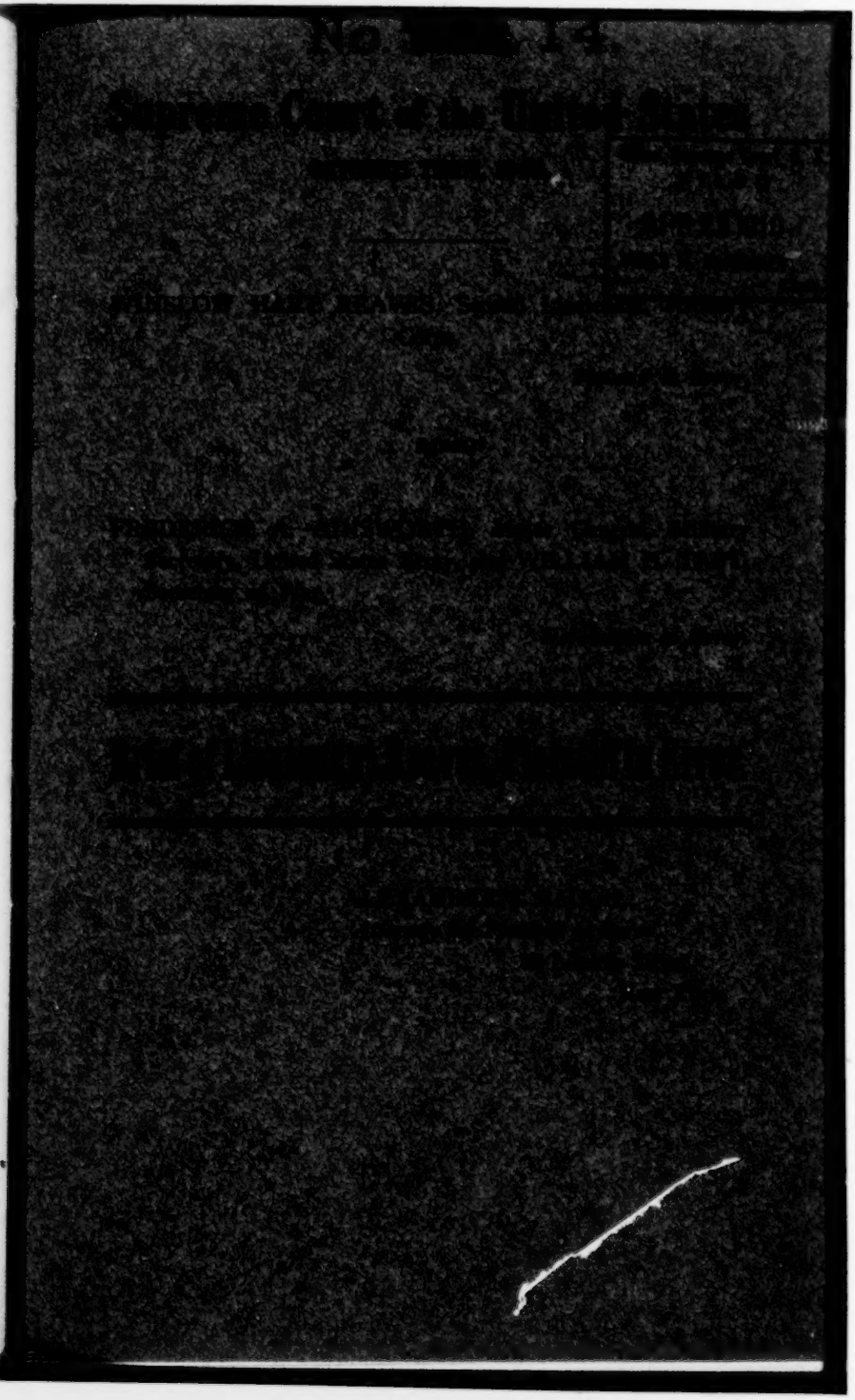
I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 36, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Winslow Hart Reaves, Second Lieutenant, Artillery Corps, U. S. Army, Appellant, vs. Frederick C. Ainsworth, Major General, Military Secretary, U. S. Army, and William H. Taft, Secretary of War, No. 1659, April Term, 1908, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 20th day of June, A. D. 1908.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,236. District of Columbia Court of Appeals. Term No. 184. Winslow Hart Reaves, second lieutenant, Artillery Corps, U. S. Army, plaintiff in error, vs. Frederick C. Ainsworth, major general, military secretary, U. S. Army, and William H. Taft, Secretary of War. Filed June 24th, 1908. File No. 21,236.



Supreme Court of the United States,

OCTOBER TERM, 1909.

WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, *Plaintiff in Error,* *vs.* FREDERICK A. AINSWORTH, Major General, Military Secretary, United States Army, and WILLIAM H. TAFT, Secretary of War, *Defendants in Error.*	No. 184.

Brief of Lieutenant Reaves, Plaintiff in Error.

Appeal from the judgment of the Court of Appeals of the District of Columbia, affirming, with costs, the judgment of the Supreme Court of the District of Columbia, which granted a motion to supersede a writ of certiorari, granted *ex parte* by Mr. Justice Clabaugh.

The brief before the Court of Appeals of the District of Columbia is hereto annexed and made a part hereof, and there is added thereto certain points in answer to the opinion of Mr. Justice Duell, and in answer to points raised in the brief below. Although a statement of the case is given in full in the annexed brief, a short analysis is given herewith.

Only points of law are involved on this appeal and all the allegations of fact contained in the pe-

tition are taken as true as Judge Clabaugh granted the motion "without considering the question "of discretion," and the Court of Appeals affirmed on the question of jurisdiction.

Statement.

Lieutenant Reaves of the Artillery Corps, while serving in the Philippines, was stricken with neurasthenia or nervous exhaustion, from which he has not recovered to this day; his health was wrecked and he is still an incompetent.

He was ordered to the Artillery School at Fort Monroe, but on account of his disease could not pursue his studies, and was given a sick leave. While thus on leave of absence, he was ordered before a board of examination for promotion as First Lieutenant. The surgeons of the Board found him physically fit for duty, but his mental examination was adjourned *sine die*. While still on sick leave he was forced to go to Fort Monroe to take the mental examination. This examination was practically a blank—October 5, 1904. This was the "first" examination. A second examination has to be had, under the law of October 1, 1890.

Immediately after this first examination, Lieut. Reaves went to the sanitarium of Dr. Weir Mitchell, the most famous specialist in mental diseases. His improvement was slight. While still on sick leave and in the sanitarium, he was ordered up for his "second" or final examination before a new Board of Examiners, convened at Fort Monroe in May, 1905. The surgeons made an adverse report physically, stating that the physical disability was owing to causes arising in the line of duty. There was no mental examination

and Lieut. Reaves supposed, as a matter of course, that he would be retired with three-quarters pay for life under the provisions of the law of October 1, 1890.

After some time he was, however, instead of being retired, ordered to a hospital in Atlanta, Georgia. Every effort to obtain the exact report of the surgeons on the examination of May, 1905, was futile; neither Senators nor Congressmen could obtain it from the War Department.

His treatment at Atlanta was farcical. Very shortly the surgeon ordered him to duty, but the Post Commander refused to receive him as a duty officer; his condition was apparent. It is openly charged that the surgeon in charge at Atlanta had direct instructions from the War Department to find him physically capable, and it is also charged that the daily reports of the nurses in charge of Lieut. Reaves contradict expressly the report of the surgeon. The surgeon did not exercise his judgment; he obeyed his orders.

Lieut. Reaves was then ordered to Fort Monroe for a further—third—examination, in August, 1905. The Board of Examiners was nominally the same, but three of the five members had, however, been changed. The two surgeons who had reported him unfit for duty were superseded by two surgeons exported from Washington to Fort Monroe, to take their places, and one of the three line officers was also changed.

When this board met, the writer, as counsel for Lieut. Reaves, spent most of the first day in arguing that the Board had no jurisdiction; that the report of the surgeons on the second examination in May, 1905, was final, and that the powers of the Board were exhausted. The motion to dismiss the proceedings for want of jurisdiction was de-

nied. Then, acting in the usual orderly procedure with Boards of this character, the Board adjourned for the day, while the surgeons made an examination of Lieut. Reaves. When the Board reconvened, these new surgeons found Lieut. Reaves fit for duty, and directed the mental examination to proceed.

Lieut. Reaves was permitted counsel by the Board, but the counsel was permitted to do nothing. He may have been ornamental, but he was not useful. There was presented to the Board a large amount of documentary evidence which neither Lieut. Reaves nor his counsel was permitted to see. This included the report of the surgeons of this same board in May, 1905, the report of the surgeon at Atlanta, and a score or more of other papers submitted to the surgeons as evidence of his physical condition. The counsel was not only forbidden the privilege of cross-examining the surgeons, but was forbidden the privilege of producing any witness to contradict them, or even to examine the documentary evidence submitted to the Board. The proceeding was a farce, and it was transparently evident that this Board, as newly reconstructed, was acting under express orders from Washington. It could not have been more illegal if the Board had matched pennies to determine his physical capacity.

The Washington surgeons went home, and the mental examination was started, when the post surgeon put Lieut. Reaves on the sick report, and this prevented the mental examination from continuing. His condition was evident to the most casual observer. They might just as well have examined a man on his death bed, or an imbecile

in an asylum. The writer was present and knows the pitiable condition of Lieut. Reaves.

Thereupon the Washington surgeons were re-exported to Fort Monroe; they ranked the post surgeon; took Lieut. Reaves off the sick report, and required his examination to go on. Blank papers were turned in.

Thereupon Lieut. Reaves was very promptly dismissed from the service under the terms of the law; *i. e.*, he was honorably discharged with one year's pay ($1,400). If physically incapacitated, he was entitled to be retired with the rank of a first lieutenant and three-quarters pay for life (a sum far more than $5,000).

The writer then obtained from Judge Clabaugh *ex parte* a writ of certiorari, to review the farcical proceedings of this Board of Examination. A motion was made to supersede the writ, and this was granted, partly on the ground that the Military Secretary (Adjutant General) had not had, for a short time, technical custody of the record, but that it was in the custody of the Secretary of War.

Wishing to determine the matter on the merits and not on a technicality, Judge Clabaugh thereafter granted an amendment to the writ of certiorari, bringing in the Secretary of War as a party. This necessitated a new argument, and on this new argument, the Military Secretary produced, not the papers called for under the writ of certiorari, but *one* of such papers—the only one that served his purpose, so that the new argument was based practically on the petition and affidavit, all of the allegations of which are thereby admitted, excepting the single controverted fact as to what was contained in the report of the surgeons in

May, 1905. This report is found at page 26, and is as follows:

> "The board is of opinion that 2nd Lieut. Winslow H. Reaves, Art'y Corps, is physically incapacitated for service at the present time, but that there is a reasonable hope of his recovery. Lieut. Reaves' present condition is such that it is not possible for him to proceed with the mental examination, without serious interference with his future recovery. His disability is due to severe cerebral and cardio-vascular neurasthenia, contracted in line of duty."

The Military Secretary did not deign to deny any of the facts alleged relative to the farcical second physical examination by this reconstructed board. As the motion to supersede the writ was granted "without considering the question of discretion," we take it that even in relation to the single controverted question of fact the allegations of the petition must be taken as true.

The points for the consideration of this Court are as follows:

Appellant maintains that when Lieut. Reaves was found incapacitated physically by the second board, in May, 1905, he was entitled, *as a matter of absolute right,* to be retired on three-quarters pay for life; that the board, having once acted, exhausted its power; and that the President was not permitted to require a further examination any more than he could require a retrial of an officer *acquitted* by court martial; that, after May, 1905, the Board of Examination had no jurisdiction whatever over either the person of Lieut. Reaves, or the subject matter of the enquiry; that under the law of the land, no officer—being appointed by

the President and confirmed by the Senate—can be deprived of his commission, except by due process of law; that such due process of law in this case consists of two independent parts, both of which must be lawful; one, the proceeding before the Board of Examination and its report, which conforms in all respects to a "decision" by a judge, which is the foundation of a judgment; second, the confirmation of that report by the President. If the proceedings before the Board and its resultant report ("decision") be illegal, the Courts have a right to declare it to be void, and if so declared void, the subsequent confirmation by the President falls because founded on a void report. This procedure follows strictly the case of People *ex rel.* Smith *vs.* Hoffman, 166 N. Y., 462, in which the writer was the relator's attorney.

Appellant also maintains that the conduct of the reconstructed Board of Examination in August, 1905, was wholly outside of any known legal proceeding in *any* country, and was so far outside of the methods of legal procedure, that it was no more a meeting of a board than though they had spent their time in playing whist and had determined Lieut. Reaves' physical capacity on the outcome of the rubber. This meeting of the board would have had no legal effect even if similar proceedings had been conducted by the first board or by the second board, the only two boards provided for in the law of October 1, 1910.

That is to say, when the Board of Examination met in August, 1905, (1) they had absolutely no jurisdiction over either the person or subject matter, in that the board had exhausted its powers in May, 1905, and was dead; (2) and that its proceedings were so scandalously outside of all known legal methods as to constitute not only an *abuse*

of discretion, but an *absence* of discretion as well as of all legal precedent. Even if it had been a court martial that had merely deprived an officer of $100 by fine, a so-called legal procedure which prevents the defendant from cross-examining the witnesses for the prosecution, forbids him or his counsel to examine documentary evidence introduced against him, and refuses to call witnesses, is not a trial at all, and the courts will prevent its alleged report of proceedings from being the foundation for any legal order. The President's approval of such a report is of no more effect than the approval of a blank piece of paper.

The appellee maintained in the appeal below, that the writ was improvidently granted; that there was no right of property involved; that the Supreme Court of the District of Columbia had no jurisdiction and that certiorari was not the remedy.

Judge Duell, in his opinion, based his opinion wholly upon want of jurisdiction. No Court, no Judge, no District Attorney has attempted to justify the arbitrary and illegal acts of the Board of August, 1906. Judge Clabaugh used some very severe language in connection with their action.

In its broadest sense, this Court has to determine whether or not the War Department, acting probably through the spite of some subaltern, has the power to deprive a man of his commission, and his right to retired pay for life, by means of a transparent fraud upon the law and a travesty of an examination, where a sick man is taken out of a sanitarium and declared to be competent to take an examination, where the undisputed facts of the petition show that he was in a condition bordering on childishness. It is not a question of interfering with the discretion of a board; it is a question of the jurisdiction of the board and of the fact that discretion, if exercised, was abused.

Appellant's Brief.

Court of Appeals, District of Columbia.

April Term, 1906.

No. 1659.

No. 4, Special Calendar.

WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S. Army, Appellant,

vs.

FREDERICK C. AINSWORTH, Major General, Military Secretary, U. S. Army, and William H. Taft, Secretary of War.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Appeal from an order of Mr. Justice Clabaugh granting *"without considering the question of discretion,"* respondent's motion to supersede a writ of certiorari granted *ex parte* by Mr. Justice Clabaugh, requiring the respondents to produce in Court Special Orders Nos. 111, 115 and 186 of the War Department, and all records of proceedings had thereunder, on the examination of the petitioner on the 23d and 24th days of May, 1905, and the 21st and 23d days of August, 1905, by the Board of Examination, convened by said Orders, to determine the fitness of the petitioner for promotion in the Regular Army, under the Act of October 1, 1890.

The original writ ran to the Military Secretary only, but the point being raised that the Military Secretary was not now the custodian of the record, an amended writ was issued which ran to both the Secretary of War and the Military Secretary. The Board of Examination having completed its labors and having been dissolved, the entire record is now in the custody of the War Department.

The argument on the original petition was had before any answer had been submitted by the Military Secretary, and all of the facts alleged in the petition and affidavit were taken as true, as in the case of a demurrer.

On that argument, Judge Clabaugh held (1) that the record was in the custody of the Secretary of War, and (2) that the President was clothed with full discretion to order an officer before a Board of Examination for examination and re-examination as often as he might please, while petitioner's attorney maintained that the Act of October 1, 1890, which provides for the examination of officers for promotion, was mandatory in its character; vested the President with no discretion; and that an officer, either on his examination or re-examination under the Act, having been found incapacitated for service owing to disability contracted in the line of duty, was thereupon *ipso facto* placed upon the retired list by the express mandate of the statute, and that he could no more be ordered up for repeated examinations than he could be retried when acquitted on a court martial.

Judge Clabaugh made some very pointed remarks to the effect that if one-quarter of the facts stated in the petition were true, the situation was a very remarkable one, and that the petitioner should have redress.

We understand, however, that he held that the President, as Commander-in-Chief, had plenary power to do almost anything, and that having approved of the irregular and unprecedented proceedings before the last Board of Examination, there was no remedy.

The Military Secretary made answer to the amended writ by setting up one fact only, viz.: the alleged exact report of the Board of Examination, dated May 24, 1905, (found at 48). Having answered to the merits and having failed to deny the very serious charges contained in the petition, these charges are, of course, taken as true, and the Appellate Court is entitled to assume the truth of every allegation of fact, and to infer the worst from the facts alleged to have occurred on a so-called examination which we sincerely hope has no counterpart in American jurisprudence.

The report of May 24th (48) was very carefully concealed from every one, until it was revealed by the answer of the Military Secretary. The mere fact of concealment is suspicious. However, the wording of the report as set forth at 48, does not change conditions on the argument in the least. The law is mandatory that, if an officer, either on examination or re-examination be then found to be incapacitated for service owing to a disability contracted in the line of duty, he is to be forthwith

retired. Any further recommendations of the Board are nugatory; and a new and farcical examination violating every precedent in law, good morals and good conscience but emphasizes the necessity of taking away from any single person the means of depriving an officer of his property, title and good name without due process of law.

His Story of the Case.

Lieutenant Reaves, of the Artillery Corps, while overworked in Manila, in the line of duty, was taken sick—had a nervous breakdown—from which he is still suffering, and which incapacitated him for service, at all of the times hereinafter mentioned. [He is now in Texas, 30 miles from a railroad, getting needed treatment in proper surroundings.]

While so sick, and on leave of absence, he was ordered before a Board of Examination for promotion as first lieutenant, convened under the provisions of an Act of Congress of October 1, 1890.

An Artillery Examining Board consists of five officers—three of the Artillery Corps and two of the Medical Corps. The proceedings before a Board of Examination of a second lieutenant for promotion are substantially as follows:

The Board meets; the order convening the Board is read in the presence of the candidate, who is asked if he objects to being examined by any member; replying in the negative, the Board is then sworn, and counsel, if any, is introduced. The Board then adjourns over until the next day, while the two medical officers of the Board make an examination of the candidate. After the examination, the Board is reconvened, when the medical members make their report, either that the candidate is capable of performing the duties of a first lieutenant, or that he is physically incapable of performing such duties. In the latter case, they are to state whether the incapacity arose in the line of duty. The report of the surgeons is then referred to the full Board, who, in executive session, adopt it or reject it. If adopted, it becomes the report of the full Board. If the candidate is found physically capacitated, the services of the surgeons are dispensed with. If they have come from a distance, they go home. The mental examination is then conducted by the three remaining members of the Board, who make a final report to the Secretary of War. If the candidate is found incapacitated

for duty, owing to disability contracted in the line of duty, he is retired; if found deficient on the mental examination, he is discharged from the service with one year's pay.

If the candidate fails on his first mental examination, he is given *one* other examination (both physical and mental) at the end of one year.

While on sick leave at Fort Hamilton under the observation of Major Powell, the Post Surgeon, Lieutenant Reaves was ordered before a Board of Examination on August 16th, 1904. The Surgeons of the Board found him physically fit for duty, but he was not examined mentally, but was, on the recommendation of the surgeons, allowed to return to Fort Hamilton for further treatment.

However, while still on sick leave, he was again ordered to Fort Monroe, on October 5, 1904, when he was forced to take the mental examination. He broke down completely, and the papers turned in were little more than blank pieces of paper.

This was the first examination.

After this failure, Lieutenant Reaves consulted Dr. Wythe and Dr. S. Weir Mitchell, two of the most famous specialists in the world, and put himself under Dr. Mitchell's treatment at his Sanitarium in Philadelphia. His exact condition is indicated in the joint affidavit of Dr. Mitchell and his son. While still under Dr. Mitchell's treatment, scarcely having been allowed to read a page of a book for a year or more, he was ordered to Fort Monroe on his *second* and *final* examination, where the surgeons reported that he was physically incapacitated for service, and that his disability was due to cerebral neurasthenia (nervous exhaustion), contracted in the line of duty. The surgeons having made this report, it was confirmed by the full Board of five officers, and forwarded to the Secretary of War. This is the report of May 24, 1904.

The petitioner maintains that, under the express wording of the statute of October 1, 1890, such action of the Board was just as final as the acquittal of a Court Martial, and that no discretion was vested in the Secretary of War, or any other person, to order him before one, or a dozen, succeeding Boards, and that, by the operation of the statute, he was thereupon retired and entitled to his retired pay during life, instead of being dismissed from the service with one year's pay.

Petitioner maintains that any further action by the Board of Examination was without jurisdiction, and void.

The petitioner supposed, as a matter of course, that he would be at once retired, and that he could return to Dr. Mitchell for treatment, or go out west where changed environment and different living, might, in the course of a year or two, lead to at least partial recovery. However, the War Department ordered him to Fort McPherson, near Atlanta, Georgia, to a hospital wholly unfitted for nervous diseases, presided over by a surgon who is notoriously intemperate, and worthless, and noted for carrying out any instructions given him by the authorities in Washington.

Very recently, a Captain Godfrey was subjected to the same star-chamber treatment as petitioner, and committed suicide. It is believed that an examination of the correspondence called for would reveal the fact that the Surgeon General instructed Dr. Birmingham to find Lieutenant Reaves physically capacitated; and he carried out his orders. Lieutenant Reaves was put in the hospital, with different attendants night and day, who made official reports, which would show Lieutenant Reaves' actual condition to have been worse than it was when in the Philadelphia sanitarium as described in the Doctors Mitchells' affidavit, but Dr. Birmingham, acting under the express command of his superior, made a report wholly contrary to the official reports made by the attendants, and Lieutenant Reaves was again ordered before the same Board at Fort Monroe—changed, however, as to a *majority* of its members; the two surgeons who had before reported that Lieutenant Reaves was physically incapacitated for duty, were relieved, together with one Artillery officer, and two surgeons from Washington were sent down to Fort Monroe, who, with the new Artillery officer, made a majority of the Board, who could be depended upon to do as they were told by the authorities in Washington.

The record of the proceedings on August 21st and 23d, 1905, does not read like the United States. One imagines himself in Russia. Everybody knows that neurasthenia is a disease that cannot be determined by a physical examination in twenty-four hours, yet the doctors reported that Lieutenant Reaves was physically capable of taking the mental examination and was capacitated for duty as a first lieutenant of Artillery, although for over a year, his condition has been such that he was not permitted even to open a book.

The proceedings before the Board were a farce. Lieutenant Reaves was allowed counsel, but counsel was useless, because

he was not permitted to cross-examine the surgeons, to call witnesses, nor even to see the papers that were submitted to the Board. No evidence was taken, and the report of Dr. Birmingham, which was presumably the basis of the surgeons' report, was kept concealed from the petitioner, and the Board refused to call for the secret instructions communicated to Dr. Birmingham by the Surgeon General. A counsel who is not permitted even to inspect exhibits or to call witnesses, may be ornamental, but he is not useful.

A mental examination having been ordered, the imported surgeons went home, and the examination proceeded; the petitioner again broke down, and the Post Surgeon put him on sick report; thereupon the Board Surgeons were re-imported; took petitioner off sick report, and watched over him while he turned in practically blank examination papers.

The War Department, having arbitrarily rejected the report of May 24th, arbitrarily accepted the report of August 23d, and the petitioner was deprived of his commission in the Army and his retired pay.

A perusal of the petition and accompanying affidavit, and especially the motions of counsel, will show the farcial character of the proceedings before this re-organized Board in all its astonishing details.

The contentions of the petitioner are as follows:

The language of the Act of October 1, 1890, is mandatory; it vests discretion in nobody. If the officer is found to be incapacitated for service in the line of duty by the Board of Examination, either on the first or second examination, he is thereupon *ipso facto* retired.

Neither the President, Secretary of War, nor any other person, is vested with any discretion in the matter, and no right is given to any officer to have him ordered before a second Board or the same Board re-modeled and re-convened.

If this could be done once, it could be done twenty times, and an officer's commission kept in jeopardy indefinitely until the authorities got such a report as they desired. If a report of the first Board as to physical capacity could be rejected, in like manner a favorable report on a mental examination could be rejected, and an officer ordered again and again for mental re-examination until a subservient Board could be found to propound catch questions and find him deficient, or corruptly to declare a perfect examination to be a failure.

To use the forms of law to attain an illegal or corrupt purpose, is the perfection of tyranny.

1. The Board of Examination having, on May 24th, found Lieutenant Reaves physically incapacitated, the Board had no jurisdiction to proceed further. Their duties were ended. The petitioner could not again have his commission and his property (retired pay), put in jeopardy at the arbitrary will of the Secretary of War.

2. Even if the proceedings before the Board on August 21st and 23d had been the first, instead of the third examination, they were so grossly illegal, unfair, and un-American—violating the law, and outraging the conscience—that the courts will intervene to protect the reputation and property of the officer.

3. The petitioner deems it a self-evident truth that under the American form of government with separate and independent legislative, executive and judicial departments, it is impossible for Congress to enact a law that could not be reviewed by the courts, and that any citizen having been granted rights and privileges under an Act of Congress, is entitled to have those rights and privileges enforced or protected in the courts of the land. That is what courts are for. If Congress can pass an Act not subject to judicial interpretation and enforcement, we have but one, not three, co-ordinate branches of government.

POINT I.

Punishments in the Army.

There is widespread misapprehension as to the power of the President and army officers in relation to army matters; and to form a just opinion of the points at issue, it is necessary that some preliminary matters should be discussed.

The President of the United States, as Commander-in-Chief of the army and navy, is not a czar or an emperor. He has not even the military power of the King of England, who is the weakest known monarch in civil matters, not having even the power of vetoing an Act of Parliament—the veto power being obsolete and last exercised in the reign of William and Mary, in the year 1692.

The President has no power to remove an officer, either di-

rectly or by indirection. As early as 1789, a debate took place in the House of Representatives relative to the power of removal by the President, and it was finally determined that he had that power, and that it applied to every officer in the government, civil or military, except the judiciary. This was a doubtful interpretation of the Constitution, and in 1866, and later, in the Civil Service laws, that interpretation as to Constitutional prerogative, has been reversed. The second clause of the 99th Article of War was enacted on January 13, 1866, as follows: "No "officer in the military or naval service shall, *in time of peace,* be "dismissed from service except upon, and in pursuance of, the "sentence of a Court Martial to that effect or any modification "thereof."

No court has ever questioned the constitutionality of that Act, and the President of the United States has no power to dismiss an officer, in time of peace, nor can he inflict the slightest punishment upon the rawest recruit. The reign of law prevails in the army as well as in civil life. (See Winthrop's Military Law, pp. 678-682.)

It is a mistaken idea—widely prevalent—that in the army a superior officer can inflict punishment on a subordinate. This is wholly a mistake. No punishment, even a reprimand in orders, can be inflicted, except through the instrumentality of a Court Martial. This is true both in England and America, and has been found to be not detrimental, but beneficial to discipline. Our regular army, governed under strict forms of law, has better discipline than the Russian army, ruled by a despot. Frederick the Great had perfect discipline, but his soldiers were ruled by fear—they feared the rattan of the drill sergeant more than the bullets of the enemy, and no one would pretend that Frederick's discipline could be depended upon to-day, in our open-order tactics which rely upon individual initiative.

The relation of the military to the civil authorities in America was beautifully, not to say, eloquently, presented in "A Treatise "on Courts Martial by Isaac Maltby, Brigadier General in the "4th Massachusetts Division and author of 'Elements of War,' "published in 1813."

The author says (page 149): "The military is subject to the "civil power; and all those who act in a military capacity are "individually responsible before the Civil Courts for any illegal "act. * * * (p. 151). As appeals from General Courts

"Martial are not allowed to any other military tribunal, an "individual who has suffered by an unjust sentence ought to "have, and is legally entitled to his remedy. * * * In a free "country, every person, be he a soldier or citizen, cannot receive "an injury either in his person or property, without finding his "remedy. * * * (p. 155). It may be alleged by military "men, that if officers are thus liable to be dragged before the "Civil Courts for their conduct toward their inferior officers "and soldiers, it will ruin the discipline of the army.

"Better would it be that an army should lose in its discipline, "than that any man, in a country of liberty and equal rights, "should not always find a remedy for injuries and abuses. Better "have no army, than that it should be superior to the civil "power.

"Every country may boast of its civil privileges, according as "the civil predominates over the military power.

"But the fear of loss in the discipline of an army by this sub-"jection to the civil power is totally without foundation. Sub-"jection to the civil power does not detract from the subordina-"tion of an army. This position is proved by a recurrence to the "practice of a nation,whose naval and military discipline will not "be questioned. No nation exists, where the military power is "more completely subject to the civil, than in Great Britain. "And no nation has a better disciplined army or navy, nor "troops which are more obedient to the orders of their superior."

The author then cites the well known case of Lieut. Frye and the abject written apology to the Court by the members of the Court Martial.

(Page 158) "The above case has been particularly stated, be-"lieving it would fully substantiate our position better than "any reasoning on the subject. Although the king did at first "express his disapprobation at the conduct of the Court of "Common Pleas, and, like many others, thought that 'military "discipline would be most affected' by the procedure; yet the "king himself was not above the dignity of the law, and ac-"quiesced. The officers were compelled to purchase their peace, "by a public and humble submission to the civil power. This "case is worthy of record in every nation, 'as a memorial to the "present and future generations.'

"After the above case is considered, it is presumed no man "will doubt the complete subjection of the military to the civil

"power, and the amenability of members of a court-martial be-
"fore the civil courts, for improper conduct towards their in-
"feriors in the army or navy.

"Where the military is thus under the control of the laws,
"but little danger is to be apprehended from a standing army.
"Those who tremble for the liberties of their country (from the
"dangers of a standing army), will suffer this anxious solicitude
"in a great measure to subside, can they but know that the civil
"power is pre-eminent in the country, both in *principle* and *prac-*
"tice. It is the *practice,* on these principles, which will secure
" and preserve our liberties from the inroads of a standing army,
"and will abate our anxieties on the subject.

"This superiority of the civil power does not detract from the
"discipline of an army. It adds to its strength, to its vigor, to
"its discipline, and respectability; because it affords protection
"to every officer and soldier, from the overbearing disposition of
"superiors; and the civil and military laws mutually contribute
"to this important object.

"In a country where liberty dwells, the ranks of an army can-
"not be filled by compulsion. No one will give up all his civil
"liberty and enter the army, unless he is sure of a remedy for
"injuries, and confident of receiving *'equal and exact justice.'*
"It is the confidence of equal protection which will recruit an
"army among freemen; which will give quiet and confidence
"to all its members; energy to its discipline, and cheerful sub-
"mission to every reasonable order.

"We know that an army may have discipline in a country
"where the military is superior to the civil power, as in a des-
"potism, or military tyranny, but never where there are any
"just pretensions to civil liberty. The word of a tyrant may
"fill his ranks with men, and the cane and the lash may reduce
"them to obedience, where millions move at the nod of a despot.

"But in a free country, the civil power must predominate.
"The highest interest of the military as well as the civil depart-
"ment requires it. It is the *soul* of liberty."

The strong arm of a despot may control an army through fear, but in a republic, the strength of an army lies in the affections of the soldiers, and discipline can only be maintained through strict justice, administered by law, and not by the arbitrary order of any superior.

The American army, though small, is the best disciplined and

most efficient in the world, and is commanded by highly educated military specialists, who have no equals. A small, well disciplined army, led by educated and experienced officers, is far more efficient than an undisciplined mob of any size, or even a disciplined body poorly led. Better an army of sheep led by a lion, than an army of lions led by a sheep! It is, therefore, of the highest importance than the character of our officers should be the highest, both for efficiency and honor.

The writer was fortunate to have been under the discipline of Generals Ruger and Upton at the Military Academy, between 1872 and 1876, when discipline and the highest standard of honor were at the zenith. At that time, as far as the writer can remember, only one graduate had ever been convicted of peculation or misappropriation of government funds, and the highest ideals in ethics prevailed. It was considered a disgrace, and would lead to social ostracism, to seek preferment through indirection—especially by political influence. However, the writer has lived to see these ideals destroyed; a number of graduates disgraced; and the army filled with political appointees whose only qualification was the friendship of a Senator. The writer has full sympathy with any legitimate methods to rid the army of inefficient and undesirable material, but if those methods shall take the form of oppression and indirection at the hands of the War Department itself, the downfall of the Republic is at hand, for the people will repudiate an army that is ruled by indirection.

Lieutenant Reaves was a most efficient young man, both by training and practice. He received nothing but commendation for his work in Manila; his private life is spotless. His dismissal from the service is a blot upon the fair name of military justice. If such methods are to prevail, every officer will feel that his commission is unsafe in the hands of an unscrupulous Department, and that flattery and subserviency are more potent protectors to a commission than efficiency in the line of duty. Such a course of conduct will raise up in the United States a party, hostile to the army, that bodes no good, and we invoke the good offices of the courts, who are not only wise in the law but patriotic in sentiment, to protect the army from itself; to stem the tide of false ideas that have arisen under a new Imperialism, and place the army again on its footing where every officer is absolutely certain of a "square deal."

An officer has no more right to strike a soldier or his junior

officer, or to inflict summary punishment, than has a Civil Judge to commit an assault on a man in the street. The military is governed *by law* quite as much as the civil departments of our government. In these days of Imperialism, this idea is often forgotten.

The President of the United States, both as civil executive and military commander, is as much subject to the Constitution and laws of Congress as is the captain of a company in his relation to his second lieutenant or privates. Neither can do a single act that is not permitted by law, and above all things, neither can deprive a soldier of his liberty, his property or any right guaranteed by Congress, except by due process of law; and if an officer be granted a substantial benefit [retired pay] by any Act of Congress, he cannot be deprived of that benefit, even by the President, while pretending to act under authority conferred by that statute. The President has no more power than a common citizen to deprive a citizen of his property, either by open robbery on the street or by the sleight of hand juggling of a statute.

POINT II.

The Act of October 1, 1890.

The Act of October 1, 1890, may be considered from two standpoints: that of (A) its express wording, and (B) from analogy.

(A)

Congress having passed an Act separate and distinct from all other acts, and containing express mandates, it is only reasonable to allege that Congress knew what it was about, and intended that the President and every subordinate should be bound strictly by the terms of the law.

Section 5 of the Act clothes the President with discretion to prescribe a system of examination, but it makes certain express provisions that are absolutely mandatory and which are express exceptions from the discretion conferred by the first part of the section. One of these mandatory exceptions is the express provision following: "Provided that should an officer fail in his "physical examination and be found incapacitated for service "by reason of physical disability contracted in the line of duty, "*he shall be retired* with the rank to which his seniority entitled

"him to be promoted. * * * And no act now in force shall "be so construed as to limit or restrict the retirement of officers "as herein provided for."

There can be no mistaking the emphatic command of this language. The Examination Board having found Lieutenant Reaves incapacitated for service by reason of physical disability contracted in the line of duty *"he shall be retired."* And the Board having made a finding in the express language of the statute, there is no power on earth, save Congress itself, that can rightfully deprive him of the benefits conferred by the law.

The Act does not contain a further exception that if once found incapacitated, he may be examined again, and again, and again, until some subservient surgeons can be found to carry out the directions of the Department.

We might properly rest here on the firm rock of the express language of the statute. If Congress had intended to clothe the President with the discretion of reconvening the Board, with changed members, time and time again, until a majority shall have been found willing to do his bidding, it would not have used the emphatic language contained in the statute.

The case of McBlair vs. U. S., 19 Ct. of Claims, 528, is an instructive brief on one branch of this case, and is conclusive upon the one important fact that the Board of Examination having once found Lieutenant Reaves physically incapacitated for service in the line of duty, *the power of the Board was exhausted,* and that by the very wording of the statute itself, he was placed upon the retired list. Neither the President nor the Board was granted a "continuing power."

Lieutenant McBlair was first "wholly" retired, and thereafter the order of the President was revoked, and it was held that the President was not permitted to change his mind.

Lieutenant Reaves obtained his commission by appointment of the President confirmed by the Senate, and he could not be deprived of that commission except under the express terms of a statute authorizing his discharge. We take the following quotations from this instructive case (19 Ct. Cl., 528):

(Page 537.) "The right of the President to command armies, "and direct the minutest movement of the soldier, is very differ- "ent from the exercise of the power of appointment of a person, "by which the higher function of war is performed, through the "instrumentality of officers of the Army. The power of appoint-

"ment in the military service is not incident to the President as "an exclusive power of his office, but is subject to the advice and "consent of the Senate, so that in its exercise, there is called into requisition other volitions than the mere will of the Presi- "dent. * * *

"Congress have not by law, vested in the President, the ap- "pointment of such officers as the claimant. The source of "power is not the President alone, but the President and the "Senate acting in concert of purpose.

"Having determined that the power of appointment in the "Army, is not incident to the President, except in the discharge "of a quasi civil function, we next inquire what is the source "of his jurisdiction over the relations of an officer to the Army, "and his right to determine the question as to whether an officer "is to be kept in the Army, placed on the retired list, or wholly "retired from the service. The last two conditions or relations "are the subjects of statutory law, *they are created by express "enactment,* are not incident to the officer as a mere soldier, and "the President in dealing with such relations, is in the adjust- "ment of rights *wholly dependent upon* THE LETTER OF POSITIVE "ENACTMENT. * * *

"Upon the report of the Board the President had the right to "adopt one of three courses with the claimant; he could disap- "prove the finding and thereby retain the claimant in the active "service, retire him from active service, or wholly retire him "from the Army, as he might determine. He had a power to "exercise in the disposition of the report, and his action thereon, "made in law, the complete exercise of the full measure of au- "thority provided by the statute. *It is not the continuing power, "but is performed to the extent of its existence by the* ONE *act "of the President.*

" 'As a general rule where the law confers a power, and the " 'person on whom it is conferred acts under it, THE POWER IS " 'EXHAUSTED, unless the same authority authorizes its subse- " 'quent exercise.' (The People vs. Town of Waynesville, 88 Ill., "470.)

" 'Whenever a named power is given to a public officer to do " 'a single particular act in a single defined case, it may be laid " 'down as an axiomatic rule that *when the act is once done the " 'power is exhausted.'* Runkle's Case (ante).

"As was said by the Court in *ex parte* Randolph (2 Brocken- "brough, 473, 474):

"'*I take it to be a sound principle, that when a* SPECIAL "'TRIBUNAL *is created, with limited power, and a particular* "'*jurisdiction, that whenever the power is once executed, the* "'*jurisdiction is exhausted and at an end*—that the person thus "'invested with power is, in the language of the law, *functus* "'*officio.* * * *

"'Examples might be indefinitely multiplied; these are suffi- "'cient to illustrate, that *whenever a special jurisdiction has* "'*once executed the power with which it was invested, their* "'*power is at an end,* as to the subject in relation to which it "'has been executed.' * * *

"*The retired list of the Army is regulated by positive law,* "being that form of just compensation, adopted by the policy of "the government towards those, whose vigorous life is spent in "the service of their country. Its regulation is necessarily very "unlike the active branch of the service—one is power, the other "is benefaction and gratitude. A code of written law may con- "trol one, but not the other.

"It is therefore no degradation of the position of the Presi- "dent to say, through the forms of judicial construction in "passing on his executive acts with reference to the retired list, "that *his power is regulated alone by acts of Congress.*

"If the President has the right to change his approval into "disapproval, *when does the right cease?* If it is incident to "him because of his high office, and because of the very delicate "and important functions inherent in him, as the head of the "Army, *those conditions continuing as they must indefinitely, his "right is measured only by the life of the officer.*

"If the President has the right to revoke an order wholly re- "tiring an officer, at any time and under all circumstances, then "he must have the correlative right to change an order, putting "a person on the retired list to that of 'wholly retired.'

"The right to review his own action, if it exist, must be subject "to reasonable limitations.

"*It cannot be the exercise of a power dependent alone, on the "will of the President.* If it does exist and is governed by rea- "sonable rules of limitation, we think to permit a change of the "order, after approval, and two distinct recognitions of such "approval, would be an unreasonable exercise of the right of re- "view. * * *

"The retired list is of comparatively recent origin; and for "years the Army endured through peace and survived in war,

"efficient in the hands of the President for the maintenance of "national honor, and the due enforcement of the law, without the "existence of the retired list, so the regulation of that depart- "ment of the service can in no wise interfere with the constitu- "tional right and power of the President as Commander-in-Chief "of the military forces of the United States.

"While the President is made Commander-in-Chief by the Con- "stitution, Congress have the right to legislate for the Army, not "impairing his efficiency as such Commander-in-Chief, and when "a law is passed for the regulation of the Army, having that "constitutional qualification, *he becomes as to that law an ex- "ecutive officer, and is limited in the discharge of his duty by the "statute.*

"The department of the service called 'retirement' is the cre- "ation of the statute, and he who claims right in it, must depend "for the measure of his claim, on the terms of the law, and "such reasonable construction, as may be justified by the intent "and purpose of the legislature.

"If injustice has been done the petitioner he must seek that "forum which is controlled alone by the Constitution. Courts "must apply law as they find it."

It took an express statute to confirm to military and civil officers their commissions and salaries, active and retired (Act of 1866, and the Civil Service Laws), and to deprive the President of his power as a Czar to dismiss an officer arbitrarily.

It took an express statute to prevent an officer from being deprived of his commission and pay except on the judgment of a court after a due trial, with full power to defend himself and cross-examine hostile witnesses (99th Article of War).

It took an express statute to retire an officer (either "wholly" or with three-quarters pay for life), and the statute guaranteed to him all the safeguards of a trial in a court (U. S. R. S. §§1245-1253), with full opportunity for defense and to cross-examine hostile witnesses including the examining surgeons.

These safeguards guaranteed by express statutes can not be broken down except by express statute.

It took an express statute to put an officer's commission in jeopardy, by examinations for promotion (Act, October 1, 1890) and existing safeguards could not be destroyed except by express terms of the statute or by necessary intendment. That statute expressly provided against oppression and injustice by expressly

providing that, if an officer be sick or "incapacitated for ser-"vice by reason of physical disability contracted in the line of "duty, *he shall be retired* with the rank to which his seniority "entitled him to be promoted."

Inasmuch as an officer's commission is secured to him by statute and can only be taken away, in time of peace, either through dismissal or retirement, by the sentence of a Court Martial or the findings of a Board [Retiring Board] having all the powers of a Court, and granting all the opportunities of defense, it follows, as a matter of course, that any new statute which has the same effect (dismissal or retirement) must be interpreted in the light of governmental policy as indicated in the Acts of Congress. It cannot be possible that Congress intended to create a new Board with all the powers of a Retiring Board, but without any of its safeguards, and thus permit a Board to dismiss an officer, without opportunity to defend himself, nor to cross-examine witnesses, or even know what *ex parte*, unsworn evidence is brought against him. If Congress had intended to permit so radical a change of policy, such star-chamber proceedings as were had on August 23d, it would have said so, and no court will infer, or read into a statute, so unusual and abhorrent powers.

The arbitrary powers assumed on August 21st and 23d, were not only not granted by the Act of October 1, 1890, under which the Board pretended to act, but such powers are denied not only by analogy (Court Martial and Retiring Boards), but by the express terms of the statute.

If Congress had intended to clothe the President with the power to examine and re-examine an officer indefinitely, it would have so expressed itself in the Act, but on the contrary, it carefully saved the officer from that form of tyranny by declaring that if found (once) incapacitated "he shall be retired." The act provides for *one* re-examination—not two or more.

An officer once acquitted by a Court Martial cannot be ordered back before the same Board (whether remodeled or not). Where, then, do we find the power to re-order an officer again and again before an Examining Board when once found entitled to retirement?

While the President may reconvene a Court Martial to revise a sentence after a finding of guilty, he cannot twice put an *acquitted* man in jeopardy; certainly not before a new court, reorganized so as to carry out the wishes of the department.

Under the express terms of the Act of October 1, 1890, Lieutenant Reaves was entitled to be (("shall be") retired upon the report of May 24th, 1905, and all future sleight of hand by the reorganized Board was without jurisdiction and void, and will be corrected by the courts by certiorari.

(B)

ANALOGY.

As a matter of fact, the first acts of a Board of Examination are those of a Retiring Board, and the effects are the same. Before the mental examination, the surgeons on the Board make their examination, and report. This was done on May 24th, and that report was adopted by the full Board; whereupon Lieutenant Reaves "shall be retired." The jury having rendered its verdict, it cannot be reconvened with a majority of the jurymen changed, so as to extort *another* verdict.

If we follow the analogy of Retiring Boards, we find that the sessions of August 21st and 23d are not only illegal and unprecedented, but absolutely abhorrent to the conscience.

The analogy of Retiring Board is only partial, for §§1245-1253, U. S. Rev. St. clothe the President with discretion at every stage of the proceeding. This is in marked contrast with the provisions of the Act of October 1, 1890.

The law as to Retiring Boards is found at pages 764-768 of Winthrop's Military Law and Precedents:—

A Retiring Board has "such powers of a court martial and "of a court of inquiry as may be necessary." It makes "findings" and has to have the approval of the President whose discretion seems to be limited to either "retiring or wholly retiring" the officer according to the circumstances. If the Board finds that his incapacity was not in the line of service, he is "wholly retired," *i. e.*, dismissed without pay. No one would suggest that the President was clothed with discretion to wholly retire an officer if the Board had found him fit for service, or to order him before the same Board time and time again until he should get the report that he desired.

We quote from Winthrop:

(Page 765) "The Board shall have and exercise such powers "of a 'court' as may be requisite to insure a full investigation, "to afford a *fair hearing,* and to enable it satisfactorily to de-

"termine the questions referred. Thus it is properly authorized "and empowered to call for and entertain such testimony of "witnesses, depositions, documents or papers, as may be material "to establish or illustrate the nature or extent of the disability, "to pass upon questions of admissibility of evidence, to grant "continuances, *to give the officer ordered before it a reasonable "opportunity of defense if desired.* * * *

"In view of the provision of Sec. 1253, in regard to the 'full "and fair hearing' to be afforded, the board will properly give "every officer ordered before it such a hearing if he desire one— *"allowing him to introduce all reasonably material evidence as "to the causes and circumstances of the alleged disability,* and "his acts and record in the service, *to cross-examine witnesses* "and interpose objections to testimony offered on the part of the "military authorities, to be assisted by counsel, and to make ar- "gument or statement. * * *

"Like a court martial, the board may reconsider and modify "its finding at any time before *transmitting its 'proceedings "and decision'* to the Secretary of War under Sec. 1250. * * *

(Page 767) "The action of the President, whose authority in "such a case is, in the language of the Supreme Court, 'wholly "dependent upon the *letter* of positive enactment' is 'equivalent "to the judgment of an appropriate tribunal upon the facts as "found, and cannot be disturbed.' "

The Supreme Court says that the action of the President is wholly dependent upon the "letter of positive enactment" and the "letter of positive enactment" in the case of the statute of October 1st, vested no discretion in the President.

The analogy to retiring boards is only partial because the statute that created the Retiring Board gave certain express powers to the President that are not contained in the Act of October 1, 1890.

If we consider the farcical proceeding of August 21 and 23 in the light of the analogy to Retiring Boards, the Board violated every principle of established procedure, as the proceedings before a Retiring Board are in the nature of a trial where the officer has the right to counsel, to call witnesses in *his* discretion, not in the Board's, to cross-examine witnesses, inspect exhibits, and do everything that would be permitted in a trial relating to a man's life, liberty or property.

In a book entitled "The Army Officer's Examiner" by Colonel

William H. Powell, U. S. A., a work used largely by officers of the army, having passed through its third edition, and recognized as an authority, the author gives certain rules of procedure for Boards of Examination found on pages VIII and IX, which are substantially those of a Retiring Board. He states on page IX: After a Board has been sworn "the Board is now organized "in the full capacity of a Retiring Board, and if there is any- "thing found in the medical examination which is likely to "render the officer unfit for promotion, all other candidates but "the one in question will withdraw from the Board, and a "further examination of the case will be continued.

"The examination of witnesses is next in order, and, when "called before the Board, the following oath will be adminis- "tered by the recorder. * * *

"The first witnesses (in case of disability) *are the medical "officers,* and they present the written certificate which they "have made, and reply to any oral questions propounded by the "Board, all of which must be made a matter of record. * * *

"Other oral testimony and documentary evidence may then "be introduced, *with the right to the candidate of objecting to "any improper evidence, and of cross-examining the witnesses "called by the Board.*

"The candidate can then produce such evidence as *he* may "deem necessary in the case. * * *

"When all the papers relating to the case have been received "by the recorder, the President will call the Board together, and "each individual paper, duly attested, *will be READ in the pres- "ence of the officer under examination*, briefed on the record and "referred to as appended, and marked A, B, or C, as the case "may be.

"After all the evidence has been duly entered, the Board will "sit with closed doors (which it has a right to do at any time "for deliberation, but not for the taking of testimony), and the "decision at which it arrives is entered upon the record, signed "by the President and Recorder only, if the officer is found in- "capacitated for active duty."

This work of Colonel Powell is not referred to as any legal authority, but merely to show what is considered an orderly and proper proceeding in a case of this character, all of which was violated in every particular by this Board of Examination on August 21st and 23d.

We do not overlook the fact that in Digest Opin., J. A. G., §2207, a contrary opinion to that expressed in this brief is set forth. It is as follows:

"6. The finding of the Board of Examination that the officer "is incapacitated for duty is not *per se* final, but must be reported "for the action of the Secretary of War and passed upon by him. "Where the finding and report of the Board have been approved "but not yet executed by actual retirement, there may intervene "contingencies which would supersede such proceeding—as the "trial and dismissal of the officer by court martial, or the aris- "ing of new causes which might make proper that the question "of his disability be inquired into by a Retiring Board convened "under Section 1246, Revised Statutes. But unless some such "new occasion and ground of disqualification be presented, the "action of the Secretary of War, in approving the report, remains "final and exhaustive, and the officer is entitled to be retired "under the Act of 1890, and can not legally be ordered before "such Retiring Board."

Inasmuch as opinions of the Judge Advocate General are not the opinion of a court, and not, generally speaking, the opinion of a lawyer even, but reflect the wishes of the Department, such an opinion is entitled to very little weight. It is not even equal to an opinion of a Corporation Counsel expressed at the request of a Mayor of a city. Nevertheless, this opinion of the Judge Advocate General does not intimate that so astonishing a proceeding as that at issue would be legal. It merely holds that the report of the Board is not final [which we deny] and that a dismissal by a Court Martial might intervene, or that some "new occasion" might arise to make it necessary to convene a RETIRING Board. There is no suggestion that after an Examination Board has found an officer incapacitated, he might again (or oftener) be ordered before the same Board.

Inasmuch as no officer of the army can be dismissed from the service by the President, except as a result of proceedings legally taken, under some express statute, it goes without saying that the retirement of an officer under the Act of October 1st, 1890, can only be had pursuant to the express terms of that Act. Nothing is to be implied to give the President powers not expressly conferred. If Congress had desired to confer discretionary powers on the President in relation to Examining Boards, the same as it did in relation to Retiring Boards, Con-

gress would have said so. The Courts have no right to read into the Act anything that is not directly expressed or necessarily implied. The language of the Act is mandatory, and it is evident that it did not intend to confer upon the President a discretion which might be abused, as it has been most outrageously in the case at issue.

Viewed in the light of analogy, the Board on August 23d violated every principle of law, equity, justice, and orderly procedure.

POINT III.

The Act of October 1, 1890, and Certiorari.

When Congress passed the Act of October 1, 1890, it conferred absolute rights upon officers just as effectively as did the Act of 1866, which made their commissions secure against arbitrary removal by the President. If the President should arbitrarily dismiss an officer, in violation of the 99th Article of War, that order would be illegal and absolutely void, and could be reviewed by a writ of certiorari.

The Act of the Secretary of War is the act of the President (Rankle vs. U. S., 122 U. S., 543), and if he claims to perform any duty imposed upon, or permitted by him under an Act of Congress, and does anything contrary to the letter and intent of that Act, such act of the President is as illegal as would be an arbitrary dismissal of an officer, and will be corrected by the Courts.

I am aware that the President is co-ordinate with the Judiciary and that the Courts have no power to punish the President for disobedience of its mandate. The Courts could not *punish* the President for contempt of Court, but that is not necessary; they can nullify his illegal acts.

Whether or not the Courts can overrule the action of a Governor of a State has been decided in various ways. Some decisions have gone so far as to hold that the Courts could not interfere even with the ministerial acts of a Governor. Other decisions have held that ministerial acts might be subject to judicial control.

In the State of New York conflicting decisions of other States were considered, and it was decided in People *ex rel.* vs. Morton,

156 N. Y., 136, that the Governor could not be *mandamused* because he could not be punished for contempt. But the Courts have never gone so far as to indicate that any wrong done by a Governor could not be reviewed by certiorari nor his action nullified. If he be a czar—if he be not amenable to the Courts of the land—we are indeed under a horrible despotism. He could arbitrarily remove every officer of the army and every civil officer, and stop the whole machinery of the land, if the Courts have no power to nullify his illegal acts.

It is not necessary, however, for the Courts to interfere with the Executive in order to enforce the law of the land. This is done by certiorari, and was so done in the case of People *ex rel.* Smith vs. Hoffman, 166 N. Y., 462, a case wherein the writer was the relator's attorney, and which resembled this case in all its essential features. There, the Court of Appeals held that certiorari would lie and the illegal act of Governor Roosevelt was declared void. In that case, Colonel Smith was ordered before a Board of Examination (then commonly called a Bouncing Board) which would not even permit him to have counsel; it took no evidence; would not even permit him to make an explanation; and in order to prevent him from getting a writ of prohibition, falsely stated to him that he could make his statement at the next hearing of the Board. They thereupon immediately dictated their adverse findings, and got the signature of the Governor, while Colonel Smith was still awaiting the adjourned hearing and the privilege of making a defense. The ruling spirit of this anarchistic proceeding was General Oliver, who was afterwards appointed by President Roosevelt to be Assistant-Secretary of War, and who as such signed the order dismissing Lieutenant Reaves from the service.

The New York Court of Appeals held that they had nothing to do with the doings of the Governor. His signature was of no effect, except to approve of the findings of the Board of Examination. The Court reversed those findings, and thereupon rendered void the approval by the Governor, so that his order, founded on the illegal proceedings, fell to the ground.

The Hoffman case is so nearly on all fours with the case at issue, that we discuss it at length.

People *ex rel.* Smith vs. Hoffman, 166 N. Y., 462.

This proceeding has been modeled largely after the above

case, where the arguments of the Attorney General were substantially those indicated in the motion to quash this writ, and the decision of the New York Court of Appeals is an answer to those arguments.

The lower courts had all held that the courts could not review the proceedings of a military board by certiorari, and the Court of Appeals held expressly, at page 475 that the *common law* "authorized a writ of certiorari to issue to military tribunals "organized under the militia statutes of the State for the purpose "of reviewing their decisions."

Colonel Smith had first been ordered before a Court of Inquiry which sat behind closed doors, and obeyed the commands of the convening authority by bringing in an adverse report. They never dared to submit the testimony to the light of public criticism. Thereupon a Board of Examination was convened, of which General Oliver was a member and the dominating spirit. This Board of Examination conducted an inquiry as farcical as that of this Board on August 23, 1905, in that they would not even permit the presence of counsel. Their "findings" were made in secret; Governor Roosevelt approved the findings, and issued an order dismissing the relator while he was still waiting for an adjourned hearing and an opportunity to make his defense.

We quote freely from the opinion in that case, as it is an excellent brief:

(Page 467) "The *office* held by the relator was of some *pe-* "*cuniary value,* but owing to his discharge he is no longer en- "titled to the income therefrom. He claims that he has been de- "prived of property without due process of law, and that a "shadow has been cast upon his name through the judgment of "a military board, pronounced without a hearing or an oppor- "tunity to be heard. The only question before us is whether the "civil courts can listen to his appeal, for, thus far, they also have "refused to hear him, not in the exercise of discretion, but for "the supposed want of power. It is claimed on the one hand "that a board of examination, appointed pursuant to section "64 of the Military Code, is a judicial body composed of officers "acting as judges, whose action can be reviewed by a writ of cer- "tiorari; and on the other, that it is simply an agency created to "advise the governor, as commander-in-chief, in respect to the "fitness of a commissioned officer to remain in the service, and

"that its proceedings are not open to review by the civil courts. "*The board is not a permanent body, and has no inherent power* "*but only such as is conferred by the Constitution and statutes,* "to which we must turn in order to discover the nature of its "functions. * * *

(Page 469) "A board of examination is not one of the four "military courts created, *eo nomine,* by article 7. * * *

(Page 471) "The action of the board is upon a question aris- "ing between the people and the officer ordered before it, and "results in a judgment based upon evidence. The power, the "procedure and the result are appropriate only to an impartial "tribunal, exercising judicial power, for the statute is carefully "drawn to secure disinterested men who are to decide the issues "according to the testimony. When * * * the law requires "a judicial determination to be made, 'such as the decision of a "'question of fact * * * the duty is regarded as judi- "'cial. * * *'" (People ex rel. Harris vs. Commissioners' "Land Office, 149 N. Y., 26, 31.) The power to hear a contro- "versy and decide it is a judicial power, and whether exercised "by a court or by a board of examination, the members act as "judges, as we think the members of the board in question acted, "both in form and in fact. It was not their duty to advise the "governor but to make an adjudication, which was essential in "order to enable him to remove the relator from office. An officer "may be removed *by* the sentence of a court-martial, or *upon* "the findings of an examining board, the former executing itself "and the latter requiring an executive order. (Const. art. 11, §6.) "With all his power as commander-in-chief the governor cannot "remove a commissioned officer of the National Guard in time of "peace without the findings of an examining board, except for "absence without leave, although the senate may remove upon "his recommendation. When judgment of removal is pro- "nounced by a court-martial, it takes effect *ex proprio vigore,* "upon the simple approval of the governor, without further "action on his part. The Constitution surrounds every commis- "sioned officer with these safeguards against the exercise of "arbitrary power and protects him until he is adjudged guilty "either of an offense cognizable by a court-martial, or of a want "of moral character, capacity or general fitness for the service, "cognizable by a board of examination. * * *

(Page 472) "It is well established that the judicial deter-"minations of inferior tribunals and officers acting judicially "under the authority of a statute, may be reviewed under a com-"mon-law writ of certiorari, which is issued to correct errors "of law affecting the property or rights of the parties, and to "test the validity of official action, judicial or *quasi*-judicial in "character. (People ex rel. Steward vs. Bd. of Railroad Com-"missioners, 169 N. Y., 202; People ex rel. Loughran vs. Bd. of "Railroad Commissioners, 158 N. Y., 421, 428; People ex rel. "Burnham vs. Jones, 112 N. Y., 597; People ex rel. Corwin vs. "Walter, 68 N. Y., 403, 408.) Unless military tribunals are "excepted from the general rule their judicial determinations "are subject to review by means of this ancient and important "writ. They are not expressly excepted either by the Military "Code or the Code of Civil Procedure. * * *

(Page 473) "No appeal is authorized by the Military Code, "and the judgments of all military tribunals are kept secret until "published in orders as approved, modified or disapproved by "the officer directing the investigation. (Mil. Code, §§113, 114.) "The appeal mentioned in section 2122 of the Code of Civil Pro-"cedure means one that can be brought, argued and heard as "a matter of right and not a secret review of a judgment, the "existence of which cannot be known to the defeated party until "after the review has been made, and in such a case as this, not "until after the judgment has been executed.

"It may be claimed, however, that the determination of military "tribunals, although not expressly excepted from the provisions "of the Code relating to the right of certiorari, are impliedly "excepted, because if civil courts were permitted to interfere "with the judgments of military courts the discipline of the "National Guard might be injured. There is force in this argu-"ment, which is confirmed to a certain extent by the decisions "of the Federal Courts relating to the regular army, and by "some, but not by all, writers on military law. * * *

(Page 476.) "The review authorized does not substitute the "judgment of the civil court for that of the military court upon "the evidence or the merits, but inquires into jurisdiction of the "subject-matter, the exercise of authority in relation to the "subject-matter according to law, *the violation of any rule of law "to the prejudice of the relator* and the like. (Code Civ. Pro., "§2140.) * * *

"The writ should be directed to the body or officer whose "determination is to be reviewed, or to *any other person having "the custody of the record* or other papers to be certified, or to "both, if necessary. (Code Civ. Pro. §2129.) The adjutant-gen- "eral [Military Secretary] is the custodian of the record and re- "port of an examining board, and hence he was properly made "a party. (Mil. Code, §15.) The determination of the examin- "ing board was to be reviewed, and hence the members thereof "were proper parties, but the action of the governor was not "to be reviewed and he should not have been made a party. His "action was executive while theirs was judicial. As he could "not have removed the relator except upon their 'findings,' a "reversal of their determination would render the order of re- "moval *void*, because there would be nothing to justify it, and "this would leave the relator still in office. While we cannot "touch the *person* of the governor, we can pass upon the effect "of *his acts* and decide whether they are valid or invalid."

This is exactly the proceeding that we seek by means of this writ. This court has the power to review *any* action claimed to be taken under an Act of Congress. If that action be illegal, this court can so declare. If the report of the Board of Examination be illegal, the order of the Secretary of War founded on the illegal proceedings had no foundation in fact, and falls of its own weight. That is to say, the court acts upon the illegal findings of the Board of Examination, and not directly upon the order of the Secretary of War. If this court shall determine that the report of the Board of Examination on May 24th was final, and that under the Act of Congress, Lieutenant Reaves was thereupon *ipso facto* retired, and shall also find that any subsequent action of that Board on August 21st and 23d was illegal, and without jurisdiction, then General Orders No. 213 discharging Lieutenant Reaves from the service has no foundation to support it, and the order becomes void and he is thereupon placed upon the retired list.

This is exactly what was done in the Hoffman case, and the analogy here is perfect, because, in the State of New York, the courts will no more interfere with the acts of the governor, whether they be discretionary or ministerial, than will the courts of the United States interfere with the acts of the President. The certiorari acts upon the illegal findings of the Board, and having declared those to be void, the President's order founded

thereupon falls. A house cannot stand after the foundation is removed. This court is asked to strike out the illegal foundation (report of August 23) of Special Orders No. 213, which discharged Lieutenant Reaves from the service, and deprived him of his commission and his property without due process of law.

CERTIORARI.

Certiorari is the only proper remedy in a matter of this character. We take the following from 6 Cyc., 737, title "Certiorari".

"Certiorari is a common law writ issued from a superior court "directed to one of inferior jurisdiction, commanding the latter "to certify and return to the former the record in the particular "case. * * *

(Note, p. 737) "Swift v. Judges Wayne, Cir. Ct., 64 Mich., 479, "31 N. W. 434 (citing Tomlins L. Dict.) The inferior court of "the definition comprehends special tribunals, commissioners, "magistrates, and *officers exercising judicial powers affecting "the property or rights of the citizen, and who act in a summary way, or in a new course different from the common law.* * * *

(Page 738) "It is the general rule that the writ will lie in "all cases, where no adequate remedy exists by which an erron- "eous determination can be reviewed or excess of jurisdiction "restrained.

"Certiorari will lie to review the determination of courts, tri- "bunals, or officers empowered to proceed in a *summary way or "in a mode unknown to the common law, where no method of re- "vision is specially provided.* So, it has been held that certiorari "will lie to *all tribunals* which are called *extraordinary* and "*special* in contradistinction to the ordinary and common courts "established for the trial of criminal offenses and the deter- "mination of private rights. * * *

(Note, p. 738) "The uniform distinction is between *judicial* "and *ministerial* acts; the former being merely voidable, and the "latter *void* if unauthorized. Hence, judicial acts being valid "until reversed, error or certiorari will lie. If the proceedings "are in a court of record according to the course of the com- "mon law, error is the appropriate remedy, otherwise the remedy "is by certiorari. Parks v. Boston, 8 Pick. (Mass.), 218, 19 Am. "Dec. 322. See also Levant v. Penobscot County, 67 Me., 429."

[The acts of the Board of Examination were not ministerial;

they were *quasi*-judicial; therefore, certiorari will lie, inasmuch as there is no appeal, and there was no "possible remedy in any other quarter." Inasmuch as the act of the Secretary of War was the act of the President, and he could not revoke his own order (19 Ct. Cl. 528), there is absolutely no other remedy but certiorari.

The Board of Examination is dissolved; application to it would be not only futile, but impossible: the President has acted; appeal to him is now useless. Every possible remedy has been exhausted; only certiorari remains.]

(Page 745) "Where such other remedy is inadequate, and "more expeditious and efficient relief can be afforded by this "writ, it may be granted, although another mode of redress is "available. * * *

"This rule is specially applicable where the tribunal below "was apparently without jurisdiction, or errors or abuses going "to the jurisdiction are complained of. * * *

(Page 750) "The office of a writ of certiorari is to bring to "a superior court for review the record and proceedings of an "inferior court, an officer, or a tribunal exercising judicial func-"tions, to the end that the validity of the proceedings may be de-"termined, excesses of jurisdiction restrained, and *errors,* if any, "*corrected.* It is not essential, however, that the proceedings "should be *strictly* and *technically judicial* in the sense in which "that word is used when applied to courts of justice, but it is "sufficient if they are *quasi*-judicial. It is enough *if they act "judicially in making their decision, whatever may be their "public character.* * * *

(Page 753, note) "The decision of a military *board of exam-"ination* is reviewable by certiorari. People vs. Hoffman, 166 N. "Y, 462, 60 N. E. 187, 54 L. R. A. 596. * * *

(Page 756) "The writ will not lie to review errors or mis-"takes in matters of discretion, where the court has acted with-"in its jurisdiction and where there has been no disregard by the "court of the procedure prescribed by law; but if the record "*shows non-conformity to legal requirements the writ will "lie.* * * *

(Page 758, note) "Refusal of a board to summon witnesses "*in a case where such summoning is discretionary with it,* is

"neither illegal action nor excess of jurisdiction. Tomlinson v. "Board of Equalization, 88 Tenn. 1; 12 S. W. 414 6 L. R. A. "207. * * * *A strong case of abuse* must be shown to war- "rant the interference of the court. Avery vs. Ruffin, 4 Ohio, "420. * * *

(Page 761) "The writ may issue to determine whether or not "the court failed to perform its duty or was guilty of miscon- "duct. * * *

(Page 770) "Under their supervisory powers, courts of gen- "eral jurisdiction exercise, by the writ of certiorari, control over "all inferior jurisdictions, however constituted, which *are vested "with power to decide on personal or property* rights, and what- "ever their course of proceeding. * * *

(Page 776) "New or necessary parties may be added. * * *

(Page 796) "The writ * * * must be directed to the "tribunal, officer, person, or body who in legal contemplation "has the custody or control of the record of the proceedings to "be certified. * * *

(Page 797) "A certiorari to review the determination of a "court-martial should be directed to the president of the "court. * * *

(Page 814) "The writ may be dismissed in the *interest of "justice*, when public policy so requires, or when public incon- "venience will result from a reversal of the determination com- "plained of. * * *

(Page 815) "It has been held that a motion to quash is in "the nature of a demurrer to the petition. * * *

(Page 819) "At common law the reviewing court is limited "in its inquiry to the consideration of whether or not the in- "ferior court had jurisdiction of the proceedings below and *"incidentally the regularity of its proceedings upon which the "jurisdiction depends.* * * *

(Page 821) "On proceedings to review the action of a muni- "cipality or of a public board, unless authorized by statute, the "court has no power to inquire into or determine its legal ex- "istence. But if so empowered, the authority to appoint the "board, its own judicial qualification to act as it did, and *the*

"manner in which it exercised its functions are open to in-"quiry. • • •

(Page 836) "On annulling the proceedings below, the review-"ing court may order restitution to a relator who has suffered by "the illegal action."

Attention is called to the fact that the granting of the relief sought for on this writ will not disarrange in the least the present status of officers in the army; its only effect will be to put Lieutenant Reaves on the retired list. The officer who has presumably already been appointed to his vacancy, will not be molested. Its effect will not in any way disarrange public business.

POINT IV.

Civil Interference with the Military.

We are aware that the United States courts have held that they cannot interfere with decisions of courts-martial on the ground that courts-martial are practically independent courts, and that the only remedy for injustice is an appeal to the President or to Congress. An exception to this rule is found in case the military court had *no jurisdiction*. See 20 Am. & Eng. Enc. of Law 658, title "Military Law" and cases cited.

It is maintained in this proceeding that the Board of Examination on August 21st and 23d, had *no jurisdiction* of either the person or the subject matter, in that the matter had been finally disposed of on May 24th, under the express mandate of the Act of October first.

It is not admitted for a moment, however, that a Board of Examination is in the same category as a court martial, which is a regularly organized criminal court, having in certain circumstances, the power of life and death. Its proceedings antedate the nation, and there are well known methods of redress by appealing to the reviewing officer.

It illy becomes the War Department to say, in one breath, that a Board of Examination is a military tribunal on an even footing with a court-martial and therefore not subject to the control of the civil courts, and in the next breath, say that proceedings before it may be arbitrary, refusing to an officer his inherent

right to call and cross-examine witnesses, and even to inspect exhibits.

The motion to quash alleges that the Board is not a judicial tribunal. The argument of the analogy of a court-martial could not, therefore, be advanced. The motion to quash seems to cut the Department off from that argument.

The only question remaining is "has Congress passed an Act "conferring upon a board of officers, or the Secretary of War, "power to deprive an officer of his commission and his property "interests therein, without taking evidence, permitting a defence, "or requiring any procedure recognized by the common law, at "the same time providing for no appeal, yet leaving the Board "unrestrained by the action of the civil courts, who are powerless "to restrain even acts of most transparent tyranny?" To state the proposition is to refute it.

A court-martial is a court proceeding along legal lines. As such, it may inflict the punishment of a fine, and thus deprive the prisoner of property, but the Board of Examination is not a court (the government claims), does not inflict punishment, and yet may deprive an officer of his commission and pay without due process of law.

We have no doubt, however, that, if a court-martial even should proceed in such barefaced violation of every principle of law and order as this Board of Examination did, that the courts would interfere.

POINT V.

Grounds for Motion to Quash.

We will reply *seriatim* to the grounds for the motion expressed in the motion to quash, as follows:

1. Writs of certiorari are generally granted on *ex parte* applications. It is the regular procedure. This writ was not granted improvidently, but after due reflection on the part of the presiding justice.

2. The allowance of the writ is not unjust and not contrary to public policy. It is never unjust to right a wrong, and it is never contrary to public policy to condemn a proceeding like this that is not only illegal, but outrages the conscience. There can be no wrong without a remedy.

3. The petition sets forth all facts necessary to confer jurisdiction on the court and warrant the issuance of the writ.

(A) The petition alleges that the petitioner is entitled to be on the retired list of the regular army as a first lieutenant with all the pay and emoluments thereof. He has a property interest in his commission, which is his retired pay for life. He has not only been deprived of his commission as an officer on the retired list, but has been deprived of his property as well.

(B) It is admitted that "Congress has entrusted to the Board "of Examination, whose proceedings are sought to be reviewed "herein, the decision of matters properly arising before it," but Congress has not entrusted to that Board, as constituted on August 21st and 23d, the decision of any matter relating to Lieutenant Reaves, in that the same Board on May 24th had disposed of the matter in *toto*, leaving the Board without the jurisdiction to act further in the premises. (19 *Ct. Cl.*, 528.)

It is denied that the Board of Examination does not exercise a judicial function. The mere fact that it is empowered to deprive an officer of his commission, and thereby deprive him of his property rights, connotes the power to act judicially, because no citizen can be deprived of his property without due process of law. If this Board does not exercise a judicial function, it has no right to deprive an officer of his commission and property, and the Act is unconstitutional. The common law writ of certiorari is not confined to reviewing acts of judicial and inferior tribunals. Tax commissioners are not judicial or inferior tribunals, and yet tax assessments are properly reviewable by certiorari only. Under modern methods of procedure in many States, certiorari never applies to inferior tribunals strictly so speaking. The proper remedy is by appeal. Certiorari is used in those extraordinary cases from which there is no remedy by appeal. It is the special and appropriate function of a writ of certiorari to right wrongs that have not been inflicted in a regular court.

4. The allowance of this writ would not embarrass any proper operations of the military serivce any more than a writ of habeas corpus would embarrass the War Department if they should arbitrarily imprison a soldier for a year without bringing him to trial. If the War Department acts within its rights and within the limits defined by justice and law and equity, it need have no fear of showing its records to a court of law. It is the peculiar function of the courts to protect a citizen whenever his rights are

infringed; otherwise we have substituted tyranny for just government in the executive branch of the nation.

POINT VI.

The Merits.

It would almost be an insult to discuss the merits seriously. The facts set forth in the petition outrage every sense of justice. If a clique in the Military Secretary's office can work its spite on an enemy by using the forms of law to commit a wrong, our laws are a travesty, and the War Department has reached a point of moral obtuseness that will shock the moral sense of the nation. It is the duty of the Court, as a good surgeon, to thrust the knife to the very center of the sore, that the patient may not die. Lieutenant Reaves has not had a "square deal" and the Courts will go far to right so palpable a wrong.

The order quashing the writ should be reversed.

Respectfully submitted,
ALEXANDER S. BACON,
Attorney for relator.
37 Liberty Street,
New York.

Dated, May 1, 1906.

POINT VII.

Judge Duell's Opinion.

Judge Duell's opinion does not question the propriety of certiorari as a means of determining the questions at issue.

Inasmuch as the motion to supersede was decided "without considering the question of discretion," we take it that every allegation of the petition must be taken as true, even though the appellee has submitted one isolated extract from the report sought to be reviewed. If that presents a question of fact, it is not at issue here, and every intendment is in favor of the allegations of the petition. However, the extract submitted by the Military Secretary does not vary the question at issue.

The whole argument of the opinion is that the Civil Courts have no power to review the proceedings of a Board of Examination, no matter how flagrant its misconduct. It holds, in effect, that if the surgeons of the board should report that a man was incapacitated for service because he had red hair, the courts would have no power to interfere, or if the surgeons should hold that a man in the last stages of smallpox was in the perfection of health, there would be no remedy—that by merely using the forms of law as a thin veil, to conceal an admitted mockery, the courts are powerless. The opinion says (p. 30):

> "The alleged lack of jurisdiction is founded on the theory that this board is not a judicial or inferior tribunal, but a special tribunal created under the power vested in the President by Congress, and that Congress did not intend to have the proceedings had under said statute reviewable by the courts, and so made no provision therefor."

There is no argument contained in Judge Duell's opinion that is not met and decided the other way in People *ex rel* Smith *vs.* Hoffman, 166 N. Y., 462. That case holds expressly that because the New York Code had not provided for a review, that the COMMON LAW method of review would prevail, in that the Board of Examination exercised judicial functions. That case is referred to as an instructive brief.

Judge Duell's opinion says at page 31:

> "If Congress had the power to provide a system of examinations for promotion, and as an incident thereto for the retirement of officers ordered before said boards of examination, we are of the opinion that it had the power to provide that the acts of the President under authority given him should be final and not directly reviewable by the courts.
>
> "Congress alone has the power to determine whether the judgment of a court of the United States, of competent jurisdiction, shall be reviewed or not. If it fails to provide for such a review, the judgment stands as the judgment of the court of last resort, and settles finally the rights of the parties which are involved."

No, if Congress has provided no review by appeal, the *common law* steps in and provides a *review* by certiorari.

The answer to Judge Duell is that we start out with the undeniable fact that since 1866, no officer, in time of peace, can be deprived of his commission except by the judgment of a court martial, or by some similar proceeding, authorized by law, and acting according to recognized methods of legal procedure; that courts martial are courts governed by the rules of law; and that any new board

instituted by Congress is presumably amenable to the rules of evidence. If a court martial should forbid an officer the right to cross-examine witnesses, or to produce witnesses in his own defense, or to examine exhibits that were admitted in evidence, would not the courts interfere on the ground that this was an *abuse* of discretion, and by so acting, the Court ceased to act as a Court, but as a mob, outside of all law? If a court martial, duly convened, should meet to play bridge, that fact should not make bridge a legal function or a correct rule of evidence.

If a court martial acting thus in travesty of the law, and therefore without jurisdiction, should fine an officer $100, would not the courts intervene? With how much the more reason, then, should they intervene in the case of a board, evidently inspired by the War Department itself, which proceeds, not within the limits of discretion, but in abuse of discretion—indeed, outside of discretion—and in violation of every law of every land?

> "Equity Will Not Suffer a Wrong to "Be Without a Remedy. This maxim in- "cludes the whole theory of equity jurisdic- "tion, that it affords relief wherever a right "exists and no adequate remedy at law is "available. * * * In accordance with the "maxim, where a statute creates a *new* right "which cannot be adequately enforced at law, "equity will contrive *new* remedies and or- "ders to enforce it" (16 Cyc., Title "Equity," p. 133 and citations).

We do not accede to the suggestion that because Congress has failed to provide a review for any special board, that thereby, the Supreme Court of the United States is remediless to interfere for

the protection of the life and property of the citizen. If Congress is silent, the common law speaks and review by certiorari will prevail.

The opinion says (p. 31):

> "If one officer, dissatisfied with the decision of an examining board, has a right to ask to have the proceedings of the board reviewed by means of a writ of certiorari, then, of course, all others have. This, it would seem, might soon lead to a demoralization of that branch of the military service."

Our answer to this is that if one officer or 1,000 officers are illegally deprived of their property or rights, so much the more necessity for the courts to teach the army the law and that nothing will so soon demoralize the military service as the impression—that is now prevalent in the army—that the greatest enemy to discipline is the War Department itself, by utilizing certain arbitrary and illegal proceedings as instruments of tyranny. When the soldiers get the idea that there is no justice at the head of the army, then is discipline subverted.

We do not claim for one moment, that a court martial or retiring board, or an examining board, can be reviewed by certiorari as to any matter of *discretion,* when they *exercise* discretion. Their discretion is as final as the verdict of a jury on a disputed question of fact, and no more so. But this is not a matter of discretion. It is not even a matter of *abuse* of discretion; it goes beyond that; their conduct cannot be dignified as an abuse of discretion; it was so extreme as to have no semblance of a trial. To continue the illustration of a court martial:

If a court martial should refuse to be sworn, refuse to allow witnesses or counsel, and condemn a man to death in time of peace, acting like a board of anarchists, rather than sane citizens, would the courts fail to interfere for the protection of the officer? Has it no power?

The opinion quotes Johnson *v.* Towsley, 13 Wall., 72, 83, to the effect that when a special tribunal acts "*within the scope of its authority*" its decision is conclusive. This goes without saying. We contend that when any board *abuses* its discretion, then the courts will interfere, and no greater abuse of discretion can be found in the annals of American jurisprudence, than in the action of this board that refused counsel of an officer the privilege of even examining the exhibits that were admitted in evidence. This amounted to a secret, star chamber proceeding.

The opinion says:

> "Nor is there anything in the statute, as we read it, which even indirectly suggests that Congress intended to authorize the courts by writs of certiorari to review the acts of the President done under it. The acts of these examining boards not being final, but subject to the approval or disapproval of the President, *they are in effect the acts of the President.* It is not to be presumed that Congress considered that the decisions of the President, when called upon to exercise *judgment and discretion* in the performance of duties devolved upon him, should be reviewable."

We answer this by asking the question: If the President should arbitrarily, in *abuse* of "judgment and discretion" dismiss an officer without law, would not the courts interfere? We deny that the act of this examining board is the act of

the President. The conditions are exactly those found in People *ex rel.* Smith *vs.* Hoffman, *supra,* where it was held expressly that the courts cannot mandamus the Governor because he was co-ordinate, but that in the dismissal of an officer, there were two steps necessary, first, the Board of Examination and its report, and secondly, the Governor and his approval. The courts did not presume for a moment to interfere with the Governor and his approval of the report; they simply declared void the report of the Board of Examination that had refused to permit counsel or to take evidence and had clandestinely rendered a report that was not founded on "judgment and discretion," but on an arbitrary act.

If the War Department is to be permitted to deprive an officer of his commission by the instrumentality of a Board of Examination that acts without the limits of any law whatever, then is our government a despotism, law a travesty, and courts a farce.

If the acts of the Board "are in effect the acts of the President," and he, as in this case, acts in secret, and there is no review by any court, then Congress has put it in the power of the President arbitrarily to dismiss any officer, and he has no redress. We have not read the statute to that effect.

The opinion quotes from 31 Wash. Law Rep., 679:

> "It is well-settled principle in our jurisprudence and policy of government that the courts can not substitute their own *discretion and judgment* for that of the executive departments of the Government in matters *properly* confided to it. Each department of Government must work in its own *proper* sphere and jurisdiction."

No one would, of course, dispute this for a moment, and yet Judge Duell would not say that the President could arbitrarily dismiss an officer unless his order was founded on a report of a Board of Examination, even though that report was founded on opera bouffe.

Every argument goes back to the one basic argument: Can any board constituted by law transact its business in such a manner as to act entirely without the realm of any law and thus deprive an officer of his commission and property without due process of law? And no one will assume for a moment that the conduct of this Board of Examination was "due process of law." Can a court or board that acts without any law whatever, be said to be a court or board at all, or be acting within its judgment and discretion? Is the Supreme Court so impotent that it cannot protect a citizen against tyranny under the guise of law?

We are not aware that the Supreme Court has ever been called upon to determine whether or not a court of law can interfere with a court martial that had acted outside of the realm of the law, and had deprived a prisoner of even the semblance of a legal trial. It is now time for the Supreme Court to declare itself emphatically.

Whether or not a writ of prohibition would issue against the President is not at issue. We will assume, for the purpose of argument, that the coordinate Supreme Court cannot prohibit the coordinate President. We will assume, too, that it cannot mandamus him and coerce him to do any act. This might interfere with the independence of the different branches of the government; but this is the argument:

If Congress has given certain powers to the

President to be exercised through certain boards, the courts do not, therefore, lose jurisdiction over the board and the steps *that lead up to* the final approval by the President. The courts have the right *to cut from under* the illegal foundation of an order of the President, which order would be valid if supported by a legal foundation, and invalid if supported by an illegal foundation, that has been declared void.

The mere fact that the President approves the report of a board does not *change the fact* that the board actually exercises judicial functions that can be reviewed by certiorari.

At page 32 the opinion says:

> "While recognizing that a board of examination is not the same as a court-martial, and that a writ of prohibition is quite different from a writ of certiorari, nevertheless we are of the opinion that the decision of the latter should not be reviewed by the United States courts, by writs of certiorari, *when it acts within the scope of its authority.* That the board of examination acted within the scope of its authority we think is shown by that part of the record referred to in the affidavit of appellee Ainsworth."

In the first place, Judge Clabaugh did not exercise his discretion to determine whether the appellee Ainsworth tells the truth, or the petition tells the truth. But even the Ainsworth account of the report of the board of May 23, 1905, shows that it is final. It makes no particular difference. The report states that at that time Lieut. Reaves was physically incapacitated. That fulfills the conditions of the law of October 1, 1890. Nothing more is required. The addition that there was a reasonable hope of his recovery has nothing to do

with the case. We presume that there are few cases of retirement, except for the loss of limbs, [illegible] what there is a reasonable hope of recovery at some time in the future.

If a man is retired for consumption, the report might state that he was incapacitated for service, but that, if he should live long enough in Arizona, he might recover. That would not prevent the retirement.

This examination was nearly five years ago, and that recovery has not yet taken place.

The opinion also states, bottom of page 32:

> "Furthermore, it is not alleged that any report of the proceedings of that session was made to the President, or that any order was presented for his approval or disapproval."

Whether or not the act of the board in May, 1905, was final, does not depend upon whether or not some subordinate officer has actually called it to the attention of the President. If the board in May, 1905, had reported that he was incapacitated for service by reason of the loss of a leg, that would not make the report any less final because the President should refuse to approve of it, and should say that by the use of a wooden leg the officer might still be useful in the service, and therefore direct him to get a wooden leg and appear for another examination.

Top page 33:

> "There is nothing in the section of the act which indicates that Congress intended that should an officer be found by an examining board to be temporarily incapacitated for service by reason of physical disability contracted in line of duty that he should not at

> a later date or dates be called before one of these boards for further examination or examinations. Until the President shall approve a finding of one of these boards, retiring an officer, the question of further examination, we think, lies within the judgment and discretion of the President and those acting for him."

This is exactly what the act does *not* say. It provides for two examinations and not for three, and does not permit the President to subject an officer to a dozen mental or a dozen physical examinations until he can reconstruct a board sufficiently often to get a board subservient enough to do what it is told.

Cases Cited by Judge Duell.

The following cases were cited by Judge Duell, and an examination of them but confirms the opinions expressed in this brief.

Johnson *vs.* Sayre, 158 U. S., 109, was habeas corpus in relation to a paymaster's clerk who was convicted of embezzlement by court martial. It was held that the Court had jurisdiction both of the person and the crime. The opinion states:

> "All questions of law and fact arising upon the record, including the evidence, are open to the consideration (bottom, p. 115). The court martial having jurisdiction of the person accused and of the offense charged, and *having acted within the scope of its lawful powers,* its decision and sentence cannot be reviewed or set aside by the civil courts by writ of habeas corpus or otherwise" (Citations, p. 118).

Judge Duell's quotation from Johnson *v.* Towsley, 13 Wall., 72-83, has already been given. This action related to a statute which declared affirmatively that "the decision of the commissioner of the general land office shall be *final*" unless an appeal be taken to the Secretary of Interior.

The Secretary of the Interior reversed the commissioner, the State courts practically set aside the decision of the Secretary of the Interior, and the Supreme Court affirmed on the sole ground that the Secretary had misconstrued the law:

> "It is fully conceded that when those officers decide controverted questions of fact, in the *absence of fraud, or imposition, or mistake*, their decision on those questions are final, except as they may be reversed on appeal in that Department. But we are not prepared to concede that when, in the application of the facts as found by them they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief" (p. 86).

The next quotation is *In re* Edwards *vs.* Root, Secretary of War, 22 App. D. C., 419. This was mandamus, and the Court held that it could not substitute its discretion for that of the defendant. But held at page 430 that mandamus and injunction will issue when a plain official duty requiring no exercise of discretion is involved.

Smith *vs.* Whitney, 116 U. S., 167, was prohibition to the Secretary of the Navy. Jurisdiction was objected to at the outset, and it was held that the case was appealable; that the salary of which the accused was deprived would amount to more than $5,000 and that the Supreme Court would have jurisdiction even though $5,000 were not in-

volved. At page 175 the Court refused to consider prohibition to courts martial, but did hold at page 179 that the court martial must follow "customary military law." That is just what is complained of in this action. The Court did not follow customary law of any court of any civilized nation.

In re Grimley, 137 U. S., 147, 153, it was held that the Court could inquire into jurisdiction, but not into errors.

We are familiar with no case where it is held that the courts cannot review an abuse of discretion or a departure from all methods of legal procedure.

The principal case on the review of court martial proceedings by a civil court seems to be Dynes *vs.* Hoover, 4 How. (U. S.), 65. In that case the defendant was charged with desertion and was found guilty of "attempting to desert." He brought an action for assault and false imprisonment against the Marshal of the District of Columbia on the ground that the judgment was void. The court held that

> "where a court has no jurisdiction over the subject matter, it tries and assumes it; *where an inferior court has jurisdiction over the subject matter, but is bound to adopt certain rules in its proceedings, from which it deviates,* whereby the proceedings are rendered *coram non judice,* that trespass for false imprisonment is the proper remedy, where the liberty of the citizen has been restrained by process of the court or by the execution of its judgment. Such is the law in either case, in respect to the court which acts without having jurisdiction over the subject matter; *or which, having jurisdiction, disregards the*

rules of proceeding enjoined by the law for its exercise, so as to render the case coram non judice (citations):

* * * * *

"or one in which, having jurisdiction over the subject matter, *it has failed to observe the rules prescribed by the statute for its exercise.*

* * * * *

"Persons then, belonging to the Army and the Navy, are not subject to illegal or irresponsible courts martial, *when the law for convening them and directing their proceedings of organization and for trial have been disregarded.* In such cases, everything which may be done is void—not voidable, but void; and civil courts have never failed upon a proper suit to give a party redress, who has been injured by a void process or void judgment."

In Mullan *v.* United States, 212 U. S., 516, the court says:

"Civil courts are not courts of error to review the proceedings and sentences of courts martial where they are legally organized and have jurisdiction of the offense and of the person of the accused *and have complied with the statutory requirements governing their proceedings"* (citations).

In Swaim *v.* United States, 165 U. S., 553, the court discussed the British Mutiny Act which permitted a revision of a court martial sentence once but not twice, and prevented the court from increasing a sentence, although it might decrease a sentence once imposed. The court held that the law of the British Army had been changed in the

United States by the express enactment of Sec. 923 of the Army Regulations, 1881 (see p. 564).

There has been no express statute whereby the President of the United States can reconvene a board of examination, but, on the contrary, the express language of the Act of October 1, 1880, prescribes that when an officer has been found physically incapacitated in the line of duty, *he shall be retired.*

POINT VIII.

Raising the question of jurisdiction.

We are surprised at one sentence contained in the opinion of Mr. Justice Duell. It is found at page 33, and is as follows:

> "We are therefore of the opinion that the appellant was properly before the board in August, 1905, and that the board had jurisdiction in the premises, *and it does not appear that appellant then and there raised the question of jurisdiction.*"

On the first day of the hearing, on August 21, 1905, a number of oral motions were made, no copies of which were kept, but all, or substantially all, related to jurisdiction, and an hour or more was taken up in discussing that point alone. The exact wording of the motions cannot be given, as they are in the possession of the Government. They are referred to at page 6, as follows:

> "(1) Counsel for Lieut. Reaves renews

each motion and request made at the session of this Board August 21, 1905, and on the same grounds."

When the application for the writ was made to Judge Clabaugh, the question of jurisdiction was urged as one of the two principal reasons for granting the writ, the other being the violation of every precedent in forbidding Lieut. Reaves the privilege of cross-examination and of even inspecting the papers presented to the board, and on which the surgeons founded their report. But the principal argument was that the second board had *no jurisdiction* in the matter, inasmuch as the action of the board of May 24, 1905, was final.

On the argument before Judge Clabaugh, when the writ was quashed, the subject of jurisdiction was likewise argued *in extenso,* as it was in the printed brief on appeal before the Court of Appeals, District of Columbia, which brief is hereto annexed.

Moreover, on the second day of the hearing, when the motions of the first day were renewed and ten more motions were made (pp. 6 and 7), the 10th motion was:

"(10) Counsel moves to strike out the report of the Surgeons of this date on the ground that the report of the Examining Board, dated May 24th, 1905, *is final,* and Lieut. Reaves' retirement is mandatory under said report under the Act of Congress of October 1st, 1890."

This negatives the statement of Judge Duell to the effect "that it does not appear that the appellant then and there raised the question of jurisdiction." This paragraph alone raises the question of jurisdiction.

If the report of the board of May 24, 1905, be final, it was final only because the board had exhausted jurisdiction, and the board of August 21 had none. That paragraph connotes the raising of the question of jurisdiction.

On the first day, the question of jurisdiction had been raised in an objection to Lieut. Reaves being examined at all, on the ground that the board had no jurisdiction, and on the following day, motion was made to strike out the report of the Board of Surgeons, for the same reason. It is in all respects similar to an objection to a question as irrelevant, and then, after the question has been admitted, moving to strike it out. The question of jurisdiction was raised on both occasions.

The petition also says (p. 9):

> "Petitioner alleges that all proceedings under said Board of Examination, subsequent to the report of May 24th, 1905, wherein it found your petitioner incapacitated for service by reason of disability contracted in line of duty, are absolutely void and without authority of law, in that said report was final and could not be, and has not been set aside, reversed or revoked by any person or board, and your petitioner is entitled, as a matter of right, to be placed on the retired list of the United States Army under the express terms of the statute of October 1st, 1890.
>
> "Petitioner further alleges that all of the proceedings before said Board on the 21st and 23rd days of August, 1905, *were void for want of jurisdiction*, were arbitrary, illegal, and in violation of every law of evidence and good morals and fair play."

The affidavit of the attorney accompanying the petition also states (p. 13) that:

> "The Court should decree that said Board *was without jurisdiction* in its said proceedings on August 21st and 23rd, and that said proceedings were illegal in that they tended to deprive the petitioner of his property without due process of law in that he was not permitted to see exhibits used against him nor to call or cross-examine witnesses."

The writer drew this petition and affidavit, and never suspected until he saw this sentence in Judge Duell's opinion, that the papers did not sufficiently set out an allegation that want of jurisdiction was raised at the hearing.

The ten written motions (the draft of which the writer happened to have retained), made on August 23d, did not more specifically allege want of jurisdiction, because that subject was uppermost in the minds of every one, and had been thrashed out elaborately in argument the day before.

However, the question of jurisdiction is sufficiently raised in the tenth motion which connotes it, and the whole petition is permeated with want of jurisdiction.

Besides, IF the board of August, 1905, had no jurisdiction, IT HAD NO JURISDICTION, and it cannot be given jurisdiction by even the assent of all the parties. If the action of the board in May, 1905, was *final,* and Lieut. Reaves was entitled to retirement as a matter of absolute right, no amount of silence following that date could confer jurisdiction on the new board. It takes a statute of the United States, not the silence of an attorney, to confer jurisdiction where none has existed heretofore.

POINT IX.

The Appellee's Brief in Court Below.

The first point maintained that it was proper to grant the motion to supersede the writ even though the Military Secretary had submitted an affidavit which, in part, denied one item of the petition.

We do not care to argue this point, as it is technical. The fact that the Military Secretary saw fit to deny one point, without denying the subject matter relating to the outrageous conduct of the board, only emphasizes the remaining facts of the petition. The brief argued that Judge Clabaugh had a right to exercise his discretion and supersede the writ. This may be admitted, but Judge Clabaugh very distinctly decided the motion "without considering the question of discretion." He, as well as the Court of Appeals, decided the point as one of law, *i. e.*, that the civil courts had no right to review the proceedings of the Board of Examination, no matter how flagrant they might be. In other words, the motion was decided as a matter of law, *viz.:* all the facts alleged in the petition being admitted as true, the petitioner was not entitled to relief; that is, the Court did not consider the partial denial of the Military Secretary, but considered all the allegations of the petition as true.

In the second point, the brief claimed that the petition did not show that any right of property is involved. The petition alleges at page 10:

> "Petitioner alleges that his commission in the Army and his right to be retired on three-quarters pay during the rest of his life is property, and is protected under the 5th Amendment to the Constitution which de-

> clared that 'no person shall * * * be deprived of life, liberty or property without due process of law.' "

A man's salary is certainly property, as much as a fine of $100. That salary is property was expressly affirmed in People *ex rel.* Smith *vs.* Hoffman, 166 N. Y., 462, and in Smith *vs.* Whitney, 116 U. S., 167. This latter case also holds that the U. S. Supreme Court would hear the appeal even though $5,000 were not involved.

There is no question of promotion involved in this controversy.

The brief cited a number of cases which showed that *Congress* had a perfect right to deprive an officer of his commission. This is not questioned, but when Congress has declared that an officer shall *not* be deprived of his commission, except after an examination by a board, the law connotes that there shall be an "examination" and not a parody of an examination.

In 1866 Congress took away from the President the right arbitrarily to dismiss an officer in time of peace, and by the act of October 1, 1890, did not give back to him that arbitrary power, through the instrumentality of a Board of Examination acting outside of all legal procedure.

The brief maintained that the mere report of the board did not become final until approved by the President. This, of course, is true, but the order of the President approving the report of the Board is of no avail unless there is a report—a legal report—both are necessary, both are coordinate; if one falls, both fall. The statute declares that when the report of the Board indicates physical incapacity, the officer "*shall* be retired," and the duty is imposed upon the President to carry out the act of Congress. It is his duty to

execute the laws, not to make them, or to subvert them.

The brief argued that if the officer should commit some crime after his examination and before the President had actually confirmed the report, that he might be ordered before a court-martial for trial. This may be true, but nothing can prevent the operation of a statute, except the act of the officer himself, not the arbitrary act of the President *in hostility to the terms of the statute.*

All the arguments contained in the appellee's brief seem to be based upon the theory, widely prevalent nowadays, that the President, as Commander-in-Chief of the Army, can do almost anything. This is not a fact. The same theory prevailed among fifteen different judges in two Departments (First and Third) in the Col. Smith litigation, all of whom were reversed or overruled in People *ex rel.* Smith *vs.* Hoffman, *supra.* The President cannot punish a man any more than a captain or a corporal can. A punishment, even so slight as a reprimand, can be inflicted only by a court-martial. An officer appointed by the President and confirmed by the Senate cannot be deprived of his commission except by *due process of law.* The President cannot dismiss him either directly or indirectly, and if he attempts such dismissal, as in this case, by indirection, the courts can examine into the circumstances and determine whether such indirection was "due process of law."

There will be no dispute that the President cannot dismiss this officer without the intervention of the Board of Examination, and if the proceedings of the Board of Examination were not "due process of law," he has been deprived of his property illegally under the Constitution. If the pro-

ceedings of the Board are void, the dismissal is void. The President cannot, by approval, make a void report valid.

The third point in the brief related to the jurisdiction of the civil courts and assumed throughout that the Board exercised its functions within the *limits of its authority*, and that what it did was a matter of *discretion*. This argument has been abundantly considered in referring to Judge Duell's opinion.

The brief reaches the erroneous conclusion that what cannot be compelled by mandamus cannot be reviewed by certiorari. This is not the law and Judge Duell did not so hold. (See People *ex rel.* Smith *vs.* Hoffman, 166 N. Y., 462.) If the President should arbitrarily dismiss an officer because he had a pug nose, the courts could not by mandamus coerce the President to reinstate the officer, but it could, by certiorari, declare the order void and the officer would be reinstated in his position, on the theory that the void order never took him out of the service at all.

The brief contains many quotations relating to the courts interfering with the discretion of special boards. We repeat that the courts will not, of course, interfere with the officers of a board when they exercise their discretion unless that discretion is abused. But in this instance, the Board of Examination went so far away from the landmarks of judicial procedure, that their action was no more the exercise of discretion than though they had tossed up a cent in order to determine the officer's physical capacity.

The fourth point of the brief was an attempt to break down the effect of People *ex rel.* Smith *vs.* Hoffman, 166 N. Y., 462, upon which the appellant relies. That case was very carefully considered, and every argument is as weighty in

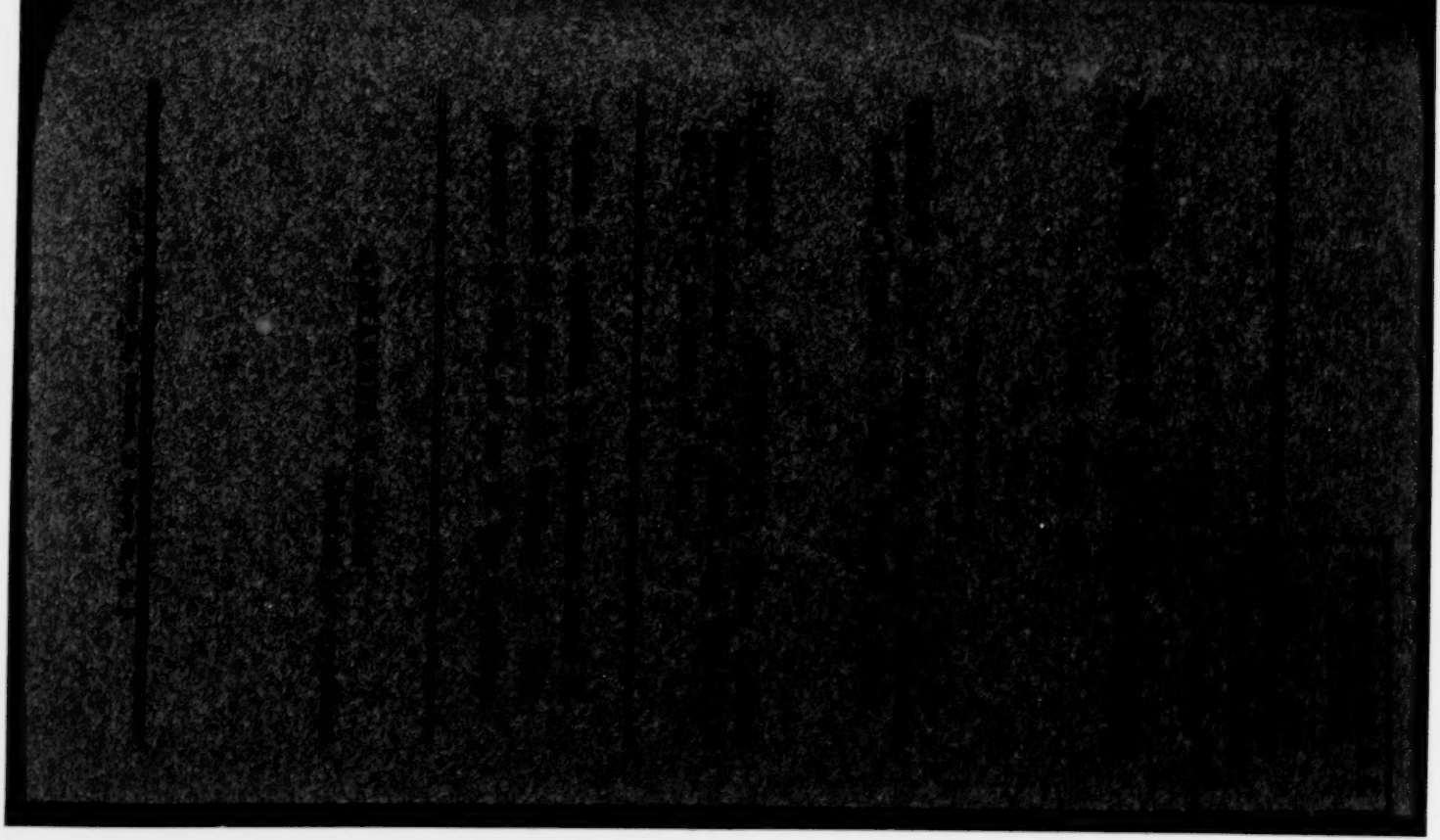
relation to the regular army as to the National Guard. Indeed, they have now practically so far assimilated the two forces that there is no essential difference, and when we consider the history of the army since the Spanish war, and see how its *esprit de corps* and high sense of honor has been undermined by political influence, and by the accomplishment of ends by indirection, we can understand how necessary it is for the Supreme Court of the United States to put its stamp of disapproval upon the irregular actions that will subvert the discipline of the army or prevent decent men from enlisting, and thus reduce its material to the lowest order of human beings who would enlist in a service where tyranny is exercised by juggling the forms of law.

If our soldiers understand that they will at all times have exact justice, and that no punishment can be inflicted, except at the hands of a court in military as well as in civil life, they will have unbounded respect for their officers, and the perfection of discipline will prevail; and with the magnificent material for armies contained in the United States, led, as they will be, by the highly educated military specialists, graduates of our Military Academy, then we can expect our armies to triumph in honor, otherwise they will be defeated in dishonor.

The order appealed from should be reversed.

ALEXANDER S. BACON,
Attorney for Plaintiff in Error,
37 Liberty Street,
New York.

April 6, 1910.



Supreme Court of the United States

October Term, 1910.

No. 14.

WINSLOW HART REAVES, Second Lieutenant. Artillery Corps, U. S. A.,

Plaintiff in Error,

vs.

FREDERICK C. AINSWORTH, Major-General, Military Secretary, U. S. A., and WILLIAM H. TAFT, Secretary of War.

Now comes the above plaintiff in error by counsel, and suggesting to the Court the resignation of William H. Taft as Secretary of War June 30th, 1908, and the appointment of Luke V. Wright as his successor as such Secretary of War, and the resignation of said Luke V. Wright March 12th, 1909, and the appointment of Jacob M. Dickinson as his successor as such Secretary of War, moves the Court to make the said Jacob M. Dickinson, as such Secretary of War, a party defendant in error in this cause, *nunc pro tunc*, as of March 15th, 1909.

ALEXANDER S. BACON,
Counsel for Plaintiff in Error.

Received a copy of the above motion this 3rd day of October, 1910.

WILLIAM R. HARR,
Assistant Attorney General,
Counsel for Defendants in Error.

Statement of case on motion to substitute the present for the former Secretary of War as one of the defendants.

Appeal from an order quashing a writ of *certiorari* designed to bring up for review the proceedings of a Board of Examination, upon the report of which Lieutenant Reaves was dismissed from the service with one year's pay, on the ground of his having failed to pass an examination required on promotion to the office of first lieutenant.

A review of the proceedings before the Board of Examination is sought by *certiorari* on the ground that when the Board of Examination met in August, 1905 (the last session of the Board as reorganized) (*a*) it had no jurisdiction over either the person or subject matter, in that the Board had exhausted its power in May, 1905, and was dead; and (*b*) in that its proceedings were so scandalously outside of all known legal methods as to constitute not only an *abuse* of discretion, but an *absence* of discretion, as well as of all legal precedent.

In other words, this proceeding is merely an appeal from an order in which neither the Adjutant General nor the Secretary of War has any personal interest. They are merely required to produce a record in their office so that the Court can look at it and determine whether or not the appellant has been deprived of property and of his right to be retired on three-quarter pay for life, without due process of law.

It is entirely dissimilar to a mandamus which is personal in its character, and requires the defendant to do some affirmative act, for disobedience of which he would be subject to punishment and costs.

The plaintiff appealed from the order quashing the writ, and the Court of Appeals of the District of Columbia affirmed. Thereupon an appeal was taken to this Court. This appeal was prosecuted and all the papers filed while Mr. Taft was still Secretary of War. There

was nothing further to be done, except to wait for the cause to be reached on the calendar of the Supreme Court of the United States. There has been no delay. 7

While awaiting the appeal to come up in its regular order, Mr. Taft, on June 30, 1908, resigned. He was followed by Mr. Wright, as Secretary of War, who in turn resigned on March 12, 1909. He was followed by Mr. Dickinson, the present Secretary of War, who is sought to be made a defendant in the place of Mr. Taft, co-defendant with the Military Secretary (now called by his old title, the Adjutnat General).

More than a year has elapsed since the resignation of Mr. Taft. It is claimed that this action has abated and that the Supreme Court has no discretion on this motion to substitute defendants. 8

There was no notice of any kind or "suggestion of resignation" on the record by appellees. I understand it is the habit of the government to remain quiescent until after the expiration of one year, and then make this motion, without notice.

The first intimation that the appellant's attorney had of the appellees' motion to abate was when the appellees' printed brief was served, just before the appeal came up on the calendar, in April last, when it was called but not heard, because the Court would adjourn in half an hour, and there was no time for argument.

Appellees move to dismiss on the ground that the cause has abated. Appellant moves to substitute as one of the defendants the present, in place of the former, Secretary of War, the custodian of the record sought to be reviewed. 9

No reported opinion has established the practice in this matter, and the appellant maintains that under the law as it now exists in the District of Columbia; (1) *certiorari* does not abate, in any event, by the mere changing of the custodian of the record in which he has no personal interest, and (2) that any motion to abate cannot be made without formal notice, or suggestion on

10 the record by the Government. Appellant maintains that this is not only the law, but good morals, and that it is abhorrent to every idea of fair practice to allow the Government to become a party to a procedure, whereby an unsuspecting appellant, by reason of resignations of which he may have no knowledge, is defeated in his right by a mere trick of practice. In other words, it is not good morals to allow the Government to cultivate the habit of deliberately keeping quiet for one year after the resignation or death of a nominal party, and thus lead the appellant into a trap of which he may know nothing. We know that public officials feel it their duty to take advantage of every technicality in favor of the Government, which they would abhor if they were practitioners
11 for an individual client, and we are confident that the present Attorney General and his staff do not approve of the practice that has been forced upon them by custom, and fear of the criticism that they would incur if they should not protect the Government by every technicality that they would never use as individual practitioners.

If a defendant should die there would be no hardship in requiring *his* representative to cause himself to be substituted within one year, because the administrator or executor would know of the death, but it would be unjust to apply that limitation, without notice, to the plaintiff who knew nothing of the defendant's death.

12 Members of the Cabinet sometimes change frequently, remaining in office only a few days, so that a substitution as to each new officer in "the chain of title" would be impossible. A busy practitioner in a distant State, who places an appeal on the calendar and has nothing to do but wait till the clerk warns him of an approaching argument, cannot be expected to keep watch of every change in the Cabinet to know whether each change in politics has affected some appeal.

From the standpoint of fair play it is not right. The practice of law is not "playing the game;" it is a straightforward search after justice.

The Law.

Appellees claim that the law of 1899 is mandatory and that, under its terms, this proceeding must abate.

Appellant claims that (1) the law of 1899 does not apply to *certiorari* at all and that (2) it is interpreted by the ancient laws of Maryland of 1785 and 1787; that the former does not repeal the latter; that both should be interpreted together, and that these two laws together require that no abatement shall prevail, without notice, notwithstanding the new limitation of one year.

The practice in Federal Courts is governed by the practice of the State in which the action is brought.

Barker *v.* Ladd, 3 Sawy (U. S.), 44; 2 Fed. Cas. No. 990.

The laws of 1785 and 1899 follow:

"The statute of Maryland, enacted in 1785, declares "(after providing for survival of the action and substi- "tution of parties) that in case there be no appearance or "proceeding by either party in any case aforesaid before "the tenth day of the second Court **after** *the death shall "be suggested,* then the action shall be struck off the "docket and discontinued" (Laws of Maryland, 1785, ch. 80, Sec. 1; quoted from 8 App. Cas. (D. C.), 137).

The statute of 1899 is as follows:

"An act *to prevent the abatement* of certain actions. "(Approved February 8, 1899.)

"Be it enacted, etc., that no suit, action, or other pro- "ceeding lawfully commenced by or against the head of "any department or bureau or other officer of the United "States in his official capacity, or in relation to the dis- "charge of his official duties, shall abate by reason of his "death, or the expiration of his term of office, or his "retirement, or resignation, or removal from office, but

16 "in such event the Court, on motion or supplemental peti
"tion filed, at any time within twelve months thereafter,
"*showing a necessity for the survival thereof to obtain a*
"*settlement of the questions involved,* may allow the
"same to be maintained by or against his successor in
"office, and the Court may make such order as shall be
"equitable for the payment of costs" (30 Stat., 822).

It is maintained that this statute does not apply to a proceeding that did not abate before its enactment, and that, in any event, in the District of Columbia, notice of death or resignation must be given the other side before a motion to dismiss can be entertained; also that "a settlement of the questions involved" require that the appeal should be heard upon the merits.

17 The State statutes of Maryland antedate the organization of the District of Columbia and remain the laws of the District unless expressly repealed. In Dananhower *v.* Ball, 8 App. Cas (D. C.), 137, it was expressly held that these statutes were still in force and were not repealed by the United States Revised Statutes, Section 995. The opinion states that Section 995 is still in force is "ad-
"mitted as far as locally applicable. Rev. Stat. D. C.,
"Section 95, but the provisions of the two statutes must be
"*in pari materia* and as if all the provisions of both were
"incorporated in one statute; and if so construed there is
"no such inconsistency or repugnancy in the provisions
"of these statutes as to a repeal, the one of the other. The
18 "United States statute is general in its provisions, while
"the adopted Act of Maryland is more specific as to a
"method of procedure."

The old Maryland statute required that suggestion of death on the record or notice to the other side be given. It says "the tenth day of the second court *after the death shall be suggested* then the action shall be stricken off the docket and discontinued."

Before 1899, every proceeding in the nature of a mandamus that would coerce and punish an *individual* and

make him liable for costs, abated absolutely, and no privy or successor could be bound to act in his stead. 19

Dananhower *v.* Ball, 8 App. Cas. (D. C.), 137.

Nearly all of the decisions quoted, or referred to in appellee's brief antedated 1899. The present status of the practice seems to be as follows:

The common law rule that resignation or death of the defendant abates the action and that no party can be substituted in his place has been abrogated by the act of 1899. That act did not repeal the old Maryland statute that prevailed in the District of Columbia. The two statutes are *in pari materia*. Both prevail. The statute of 1899 is "general in its provisions while the adopted act of 20 Maryland is more specific as to method of procedure" 9 App. Cas. (D. C.), 137.

In other words, the provisions of both acts must be complied with before a case can be stricken from the docket and discontinued. Suggestion of death or resignation must be made on the record or notice given to the other side and one year must expire before the motion to dismiss can be entertained.

This interpretation is only fair. The Attorney-General knows when cabinet officers change, but attorneys in distant States do not, and no motion to abate should be granted without notice of the change, thus giving the attorney an opportunity to substitute the new cabinet officer. 21

Mandamus and Certiorari.

A distinction may properly be made between mandamus and *certiorari*, and the practice referred to in the respondent's brief relates to proceedings taken to mandamus a defendant and punish him by imprisonment, if in contempt, and to mulct him in costs, if unsuccessful.

Certiorari is wholly different. It is merely the ma-

22 chinery of an appeal wherein the public official has no substantial interest. I do not understand that the defendant would have to bear the costs if defeated. He would simply have to produce the record, if the Court should so order, in order that the review of the proceedings may proceed in an orderly way.

All reasoning in relation to mandamus falls when applied to *certiorari.*

Mandamus Abates Because it is Personal.

The leading case on mandamus—the one which all the subsequent cases quote, is:

U. S. *v.* Boutwell, 17 Wall 604 (1873). Judge Strong says in that case (p. 608) "This mandamus became in ef-
23 fect a *personal* action against the defendant. This statute was in force in Maryland when the District of Columbia was a part of that State and hence is in force in the District now. *Therefore, whatever may be the rule elsewhere, here a writ of mandamus must abate whenever the performance by the defendant of the personal duty it seeks to enforce has become impossible.*"

The Court also says at p. 607 that a mandamus is "a "personal obligation of the individual to whom it ad- "dresses the writ. The writ does not reach the office. It "cannot be directed to it. It is therefore, in substance, "a personal action. * * * It is the personal default "of the defendant that warrants interpretation of the writ
24 "and if a peremptory mandamus be overruled, costs must "fall upon the defendant." This case holds expressly that the successor of the Secretary of the Interior was not in privity with his predecessor, and that there is an abatement in mandamus as in all personal action.

In Warner Valley Stock Co. *v.* Smith, 165 U. S., 28, which was an action for a "mandatory injunction," the Court discussed at length the peculiarities of mandamus as a personal action which must be preceded by a demand to which his successor might accede. "If he be an officer "and the duty be an official one, still *the writ is brought*

"*exclusively against him as a person* to whom the writ 25
"is sent. * * * *The writ does not reach the office; it*
"*cannot be directed to it.*"

The same case says at page 33: "And in Thompson *vs.* U. S., Mr. Justice Bradley said: 'The case in which it "has been held by this Court that an abatement takes "place by the expiration of the term of office, have been "those of officers of the Government whose alleged DELIN-"QUENCY *was personal and did not involve any charge* "*against the Government whose officers they were. A* "*proceeding against the Government would not lie.*' "

United States *ex rel.* Bernardin *vs.* Butterworth, Commissioner of Patents, 169 U. S., 600 (1898), was a motion to substitute. It was an action to compel issuance of a patent and was expressly treated as mandamus (see page 26
602). In was held that there could be no substitution in mandamus because it is a personal action, quoting at length Judge Strong, in 17 Wall, 604: "Besides, were a "demand made upon him, he might discharge the duty and "render the interposition of the Court unnecessary. In "all events, he is not in privity with his predecessor; "much less is he the predecessor's representative. * * "In Thompson *vs.* U. S. 103 U. S., 480, the distinction is "pointed out between proceedings where the obligation "sought to be enforced devolves upon a corporation or "continuing body, and those where the duty is personal "with the officer. *In the former case, there is no abate-*
"*ment*" (bottom page 603).

27

It also held that Chapter 80, Laws 1785, did not apply to the law as it then stood (1898) because the successor was not a privy, but the act of 1899 permits the successor to be substituted.

On page 33 the opinion holds that this action is equivalent to a mandamus and that it abated *because* it was mandamus. The strongest possible inference is drawn that if it had not been a personal action in mandamus, but had been a mere cause of action in which the defendant was not personally interested, it would not have abated.

28 **Certiorari.**

Certiorari is merely an appeal, and who would suggest that an appeal should abate simply because the Clerk of the Court, who had the custody of the record below, should go out of office?

"A writ of *certiorari*, when issued, in a case like the "present, is somewhat in the nature of a writ of error."

District of Columbia *v.* Burgdord, 8 App. Cas. (D. C.), 465, 471;
Harris *v.* Barber, 129 U. S., 366.

It "enables a court of superior common law jurisdic-
29 "tion to inspect and revise the proceedings of an inferior "tribunal, as to the elements and exercise of its special "jurisdiction."

Bond *v.* Hardware Co., 15 App. Cas. (D. C.), 72, 74.

We are aware of no state, territory or district where an appeal abates merely by reason of the death or resignation of the appellee. After judgment the relation of the parties is fixed, and the death or resignation of any party after judgment cannot in any way affect the judgment already entered.

This is especially true where the appellee is a nominal
30 party only, having no personal interest in the controversy.

Even in case of a mandamus it has been held that it did not abate, when it was mandamus in form only. The substance must not be sacrificed to form. The Court says in Thompson *v.* U. S., 103 U. S., 480, 483:

"But we cannot accede to the proposition that proceedings in mandamus abate by the expiration of the term of office of the defendant where, as in this case, there is a continuing duty irrespective of the incumbent, and the proceeding is undertaken to enforce an obliga-

tion of the corporation or municipality to which the office is attached. The contrary has been held by very high authority. People *v.* Champion, 16 Johns. (N. Y.), 60; People *v.* Vollins, 19 Wend. (N. Y.), 56; High, Extr. Rem., sect. 38. We have had before us many cases in which the writ has, without objection, been directed to the corporation itself, instead of the officers individually; and yet, in case of disobedience to the peremptory mandamus, there is no doubt that the officers by whose delinquency it was incurred, would have been liable to attachment for contempt. The proceedings may be commenced with one set of officers and terminate with another, the latter being bound by the judgment. Board of Commissioners of Knox County *v.* Aspinwall, 24 How., 376; Supervisors *v.* United States, 4 Wall., 435; Von Hoffman *v.* City of Quincy, *id.*, 535; Benbow *v.* Iowa City, *id.*, 313; Butz *v.* City of Muscatine, 8 *id.*, 575; Mayor *v.* Lord, 9 *id.*, 409; Commissioners *v.* Sellew, 99 U. S., 624; and many others. 31 32

"And so, if we regard the substance and not the mere form of things, a proceeding like the present, instituted against a township clerk, as a step in the enforcement of a township duty to levy the amount of a judgment against it, ought not to abate by the expiration of the particular clerk's term of office, but ought to proceed to final judgment, so as to compel his successor in office to do the duty required of him in order to obtain satisfaction from the township. The whole proceeding is really and in substance a proceeding against the township, as much as if it were named, and is in the nature and place of an execution. If the resignation of the officer should involve an abatement, we would always have the unseemly spectacle of constant resignations and reappointments to avoid the effect of the suit. *Where the proceeding is in substance, as it is here, a proceeding against the corporation itself, there is no sense or reason in allowing it to abate by the change of individuals in the office.* The writ might be directed to the township clerk 33

by his official designation, and will not be deprived of its efficacy by inserting his individual name. The remarks of Mr. Justice Cowen, in People *v.* Collins (19 Wend., N. Y., 56) are very pertinent to the case, and seem to us sound. That was a mandamus to commissioners of highways who were elected annually; and it was objected that their term would expire before the proceedings could be brought to a conclusion. He said: 'The obligation sought to be enforced devolves on no particular set of commissioners, and no right is in question which will expire with the year. The duty is perpetual upon the present commissioners and their successors; and the peremptory writ may be directed to and enforced upon the commissioners of the town generally. *To say otherwise would be a sacrifice of substance to form.*' In this connection we may also refer to the recent case of Commissioners *v.* Sellew, *supra.*

"*The cases in which it has been held by this court that an abatement takes place by the expiration of the term of office have been those of officers of the government, whose alleged delinquency was personal, and did not involve any charge against the government whose officers they were.* A proceeding against the government would not lie. The Secretary *v.* McGarrahan, 9 Wall., 298; United States *v.* Boutwell, 17 *id.*, 604."

In another case of mandamus, a substitution was granted when it was deemed "there is a necessity for such action in order to obtain a settlement of the legal question involved."

Caledonia Coal Co. *v.* Baker, 196 U. S., 432 (1904).

The statute of 1899 relates only to cases that abated before its enactment. The *certiorari* does not abate, therefore the statute of 1899 does not apply.

In a mandamus which is purely a personal proceeding, the proceeding does not survive. It abates with the

death or the resignation of the person sought to be mandamused. *Certiorari* is wholly different. *The cause of action survives.* That is to say, the right to review—appeal from—the decision of a Board of Examination is just the same whether the record is in the hands of one man or another. Whether it be in the custody of one Secretary of War, or his successor, or in the hands of the Military Secretary, this fundamental difference is the fact "that the cause of action survives." 37

The Common Law.

Under the common law *mandamus* would abate upon the death or resignation of the officer. This was because mandamus was personal, and must be preceded by a demand to which his successor might accede; and was followed by punishment for contempt of court, and the imposition of costs. 38

Certiorari did not abate at common law. It is impersonal. It is merely a form of appeal. The defendant has no personal interest in the controversy. He merely produces a record, not his own, but the Government's, and in which he has no personal interest. There is no personal punishment or muleting in costs.

The two proceedings are fundamentally different. Arguments relating to abatement in case of *mandamus* do not apply to *certiorari.*

Every case cited by appellees refer to *mandamus* or to some action in the nature of a *mandamus*, and in each case the argument rests upon and cites the principal case on mandamus. 39

Cases Cited by Appellees.

The appellees' brief cites five cases only (see pages 3 and 4):

United States *v.* Boutwell, 17 Wall., 604;
Warner Valley Stock Co. *v.* Smith, 165 U. S., 28;

40 United States *ex rel.* Bernardin *v.* Butterworth, 169 U. S., 600;
Danenhower *v.* Ball, 8 App. Cas. (D. C.), 137;
Irrigation Land and Improvement Co., appellant, *v.* Ethan Allen Hitchcock, Secretary of the Interior; dismissed without opinion in 215 U. S., 613.

17 Wall., 604, was mandamus; 165 U. S., 28, was "mandatory injunction" and expressly alleged to be the same as mandamus (see page 33). 169 U. S., 600, was to "compel issuance of patent" and expressly treated the same as mandamus. 8 App. Cas (D. C.), 137, was assumpsit, but suggestion of death had been filed more
41 than a year before. 215 U. S., 613 (no opinion), was "for an injunction against the Secretary of the Interior "* * * to restrain interference with appellant's irri-"gation system * * * in the Territory of Arizona, "and stands upon the question of the power of the Courts "of the District to entertain an action respecting injury "to land within one of the States or Territories, except "in a local tribunal of such State or Territory, which was "decided adversely to the appellant in the original and "Appellate Courts below. * * * It is true that the "defendant below claimed that a very old case in this "Court was decisive, and that his contention was sus-"tained by the lower courts" (quotation from appellant's
42 brief in that case, pages 16 and 17).

The appellees rely upon this case, but it would appear that there was no equity in the appellant's contention in that case and that he had brought his action in the wrong forum. Inasmuch as the Court wrote no opinion in 215 U. S., 613, we do not deem that case as indicating or controlling the practice in the Supreme Court of the United States.

In Danenhower *v.* Ball, 8 App. Cas. (D. C.), 137 (1896) plaintiff died; four months later one defendant made a suggestion of death on the record. More than a year

elapsed after this suggestion when a motion was made to 43
dismiss. *Then* the executor was substituted *ex parte*, and a motion to vacate the *exparte* order was granted, on the ground that the suggestion of death on the record was notice to the parties, and that more than a year had elapsed *after notice*. The Court says, at page 140:

"By the Act of Maryland of 1785, Chapter 80, Section "1, *in force here*, it is provided that no action brought in "any court of law shall abate by the death of either of "the parties to such action; * * * The proceeding "for bringing said representative or substituted party "is founded upon a suggestion of death of the original "party made of record; and it is provided that 'in case "there be no appearance or proceeding by either party in 44
"any case aforesaid, before the tenth day of the second "court *after the death shall be suggested, then the action "shall be struck off the docket and discontinued*' "(italics by the Court). * * *

"It is, indeed, a salutary limitation for bringing to a "termination pending litigations; for, without such limi- "tation or restriction as to time, the settlement of de- "cedents' estates would be greatly impeded and delayed.

"*By the common law*, and in the absence of an express "statutory provision authorizing the making of new par- "ties, *the death of either plaintiff or defendant would "abate the action*" (Green *v.* Watkins, 6 Wheat, 260).

The opinion also states that the fact that Section 955 is in force in the District of Columbia is "admitted as far 45
"as locally applicable (Revised Statutes, D. C., Section "95). But the provisions of the two statutes must be "construed *in pari materia*, and as if all the provisions of "both were incorporated in one statute and being so con- "strued, there is no such inconsistency or repugnancy in "the provisions of these statutes as to operate a repeal "the one of the other. The United States statute is gen- "eral in its provisions, while the adopted Act of Mary- "land is more specific as to method of procedure, &c."

This case was argued in 1897, before the act of 1899.

46 The argument in this case requires notice to the adversary before a motion in abatement can be made.

Delay.

The argument that the statute of 1899 was intended to prevent delay, has no force in this instance. The case is to be argued the moment it is reached in its regular order. The record was complete, in the custody of the Clerk of the Supreme Court of the United States, while Secretary Taft was in office. Appellant had nothing to do but wait for the privilege to argue. There has been no delay.

If the attention of the appellant's attorney had been
47 called to the fact of the changed defendants, either by notice or by "suggestion of resignation," a motion would have been made immediately for the change. It will be noted that two substitutions would have been required, one when Mr. Wright succeeded Mr. Taft, and another when Mr. Dickinson succeeded Mr. Wright; and if a new Secretary of War had been appointed every six months, just so often would a new substitution have had to have been made.

Joint Custodian.

As the record now stands, under the *amended* petition, it is claimed that the records sought to be reviewed are
48 in the custody of both the Military Secretary and the Secretary of War. When the Military Secretary put in an answering affidavit and produced a small fraction of the record sought to be reviewed, he did not object that he was made a joint defendant. There is no such objection on the record (p. 24). His production of a part of the record was an admission that he was the actual custodian of that record, and that he was rightfully a joint defendant with the Secretary of War. As a matter of fact, although the Secretary of War may be the nominal custodian, the actual custodian of the records sought to be

reviewed is the Adjutant-General. It was the Military 49
Secretary, not the Secretary of War, who actually produced the fraction of the record presented to the Court and he states at p. 25 that "he has knowledge of the record of the petitioner sought to be reviewed herein."

The Secretary of War was not substituted for the Military Secretary. He was joined with the Military Secretary as an additional defendant, and as a joint custodian, and no objection or exception was taken to that fact either in the Supreme Court of the District of Columbia, or in the Court of Appeals of the District of Columbia, and if it be true that they are joint custodians of this record—and the record admits that fact—then the resignation of one of the joint custodians would not cause the proceeding to abate. 50

There is no plea of an improper joinder of defendants; no answer of the defendant, Ainsworth, that he was not properly a party of record *after service of the amended petition.*

Section 217 of the United States Revised Statutes cannot change a fact. It may be that the Secretary of War is the custodian of a record by act of Congress, but if it be a fact that it is not actually in his custody, but the real fact is that the record is in the actual possession of the Military Secretary, and he admits it on the record, by not denying it, no number of statutes can change one stubborn fact.

"In a suit against two defendants, if one died pend- 51
"ing appeal and before commencement of the term, and "the right of action survived, judgment may be entered "against the survivor and suggestion of the death re- "corded" (McNutt *v.* Bland, 2 How., 28).

The points involved in this litigation are too important to be sidetracked by a technicality. They are of momentous importance and ought to be settled. The Supreme Court of the United States should forever set aside the alleged right of the President of the United States to deprive an officer of his commission by means of the trick

52 of a board of examination which violates every rule of legal procedure.

The Merits.

The respondent's brief on the merits seems to need no reply. There is no pretence that the Government has any merits in the action. There is no claim that the anarchistic proceedings before the Board of Examination were within the limits of any law or justice or recognized legal procedure. The only claim advanced is that the President, under the statutes of Congress, has the arbitrary right to dismiss an officer, not by direct order for which he would be responsible to the people, but by indi-
53 rection and the trick and device of a dummy board of examination that violates every principle of law and good conscience.

It strikes the writer as somewhat strange to claim that there is a difference between People *ex rel.* Smith *v.* Hoffman, 166 N. Y., 462, and this case at issue, in that, in the Smith case the relator was forbidden counsel, and in the Reaves' case he was granted use of counsel, who was not permitted to exercise any of the functions of a lawyer. Lieut. Reaves' counsel may have been ornamental, but he performed no useful function in that he was not permitted to examine a witness or even look at the exhibits upon which the Board reached its conclusion.

The reasons given for not calling the surgeons as wit-
54 nesses were because they had made certificates—not under oath—which certificates were before the Board.

If the Government can prevent a witness from being sworn and cross-examined by simply asking him to make, in advance, an unverified statement, which neither the prisoner nor his counsel is permitted to see, the rules of law are somewhat different under the national and state governments.

Besides, what advantage is it to the defendant if when one, not a witness, has made a written statement and that statement is produced in Court, neither he nor his lawyer

is permitted to see it? In what respect does this procedure differ from a trial behind closed doors that neither the client nor his lawyer is permitted to enter? 55

If the fact be once admitted that an officer is permitted to attend in the presence of a Board of Examination and have the attendance of counsel, that admission connotes the right of the officer to see the witnesses or their certificates, and the right of his lawyer to cross-examine, or at least to gaze at the witnesses or their certificates.

This whole proceeding is so revolting, and so abhorrent to all our ideas of law under a Republican form of government, that we instinctively look to the Czar of Russia for a precedent. It is such acts of injustice, and such wide divergence from established legal procedure that breed anarchists. 56

New York, October 10, 1910.

ALEXANDER S. BACON,
Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

WINSLOW HART REAVES, SECOND LIEUTENANT, Artillery Corps, U. S. Army, Plaintiff in Error,

v.

FREDERICK C. AINSWORTH, MAJOR-GENERAL, Military Secretary, U. S. Army, and William H. Taft, Secretary of War, Defendants in Error.

No. 184.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANTS IN ERROR.

General Ainsworth not having custody of the records sought to be reviewed, and no motion having been filed for the substitution of the successor to Mr. Taft as respondent within twelve months after the latter's resignation, as required by the act approved February 8, 1899 (30 Stat., 822), the judgment should be affirmed because the petition in any event would have to be dismissed.

This was a petition to the Supreme Court of the District of Columbia by Lieutenant Reaves for a writ of certiorari to review the proceedings of a board of

examination convened under authority of the Act of October 1, 1890, Sec. 3 (26 Stat. 562). (Rec. 1.)

Originally, General Ainsworth was the only respondent, and a writ of certiorari was issued to him as custodian of the records and proceedings of the board of examination sought to be reviewed. (Rec. 18.)

A motion to quash the writ was filed by General Ainsworth, which, besides stating certain grounds addressed to the jurisdiction of the court and the propriety of issuing the writ, alleged (Rec. 20):

> Your respondent is not charged by law with the custody of the records, minutes, orders, and findings and papers of the proceedings of the Board of Examination sought to be reviewed and brought before this court, and is not the custodian thereof, nor is he charged in law with the duty to act or decide thereon.

Upon consideration of the motion, it was granted and the petition dismissed, "the question of discretion not being considered." (Rec. 20.)

Petitioner then obtained leave to amend the petition by adding "William H. Taft, as Secretary of War," as one of the respondents. (Rec. 21–22.)

The amended writ of certiorari was then issued to General Ainsworth and Secretary Taft as custodians of the records and proceedings sought to be reviewed. (Rec. 23.)

A motion to supersede the writ issued on the amended petition was filed by the respondents.

(Rec. 24.) Upon consideration the court held that the writ had been "improperly granted," and dismissed the petition at the cost of petitioners. (Rec. 26–27.) Upon appeal, the Court of Appeals affirmed this judgment. (Rec. 29–34.)

Mr. Taft resigned his office as Secretary of War on June 30, 1908.

The act of February 8, 1899 (30 Stat., 822), is as follows:

AN ACT To prevent the abatement of certain actions.

> *Be it enacted, etc.*, That no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the Court may make such order as shall be equitable for the payment of costs.

In *Irrigation Land and Improvement Company, Appellant,* v. *Ethan Allen Hitchcock, Secretary of the Interior,* No. 17, October term, 1909, a motion to substitute Secretary Ballinger for Mr. Hitchcock, which was made more than twelve months after the

resignation of the latter, was denied by the court on May 24, 1909, although Secretary Ballinger had consented to his substitution, and on October 22, 1909, the case was dismissed on motion of counsel for the appellant. (215 U. S., 613.)

In the brief of the Solicitor-General, filed in opposition to the motion to substitute Secretary Ballinger, reference was made to the following cases, among others, in support of the view that but for the act of February 8, 1899, the suit would have abated *at once* upon Secretary Hitchcock's retirement, and strict compliance with the terms of that act was necessary in order to save the cause of action, the consent of Secretary Ballinger to his substitution not being sufficient to give the court jurisdiction:

> *United States* v. *Boutwell*, 17 Wall., 604.
>
> *Warner Valley Stock Co.* v. *Smith*, 165 U. S., 28.
>
> *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S., 600.
>
> *Danenhower* v. *Ball*, 8 App. Cas. (D. C.), 137.

In *United States* v. *Boutwell* (supra), the court, after stating that it was the personal default of a public officer that warranted the issuance of judicial process to coerce the performance of his official duties, said (pp. 607–608):

> It necessarily follows from this that on the death or retirement from office of the original defendant the writ must abate in the absence of any statutory provision to the contrary. When the personal duty exists only so long

> as the office is held, the court can not compel the defendant to perform it after his power to perform has ceased. And if a successor in office may be substituted, he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own.

Further discussion of this question seems unnecessary in view of the action of the court in denying the motion to substitute Secretary Ballinger in the case of the Irrigation Land and Improvement Company.

It would seem to follow that as General Ainsworth, the remaining defendant, is not the custodian of the records sought to be reviewed by the petition in this case, and the writ of certiorari would again have to be quashed on that ground, the judgment of the Court of Appeals should be affirmed for this reason alone.

That the Secretary of War was and still is the custodian of the records in question appears from the following section of the Revised Statutes of the United States:

> SEC. 217. The Secretary of War shall have the custody and charge of all the books, records, papers, furniture, fixtures and other property appertaining to the Department.

ON THE MERITS.

Analysis shows that the petition for a writ of certiorari is based upon two grounds, the primary one being that because of the finding of the examining board convened on May 23, 1905, and which reported as to Lieutenant Reaves's condition on May 24, 1905, the board subsequently convened on August 21, 1905, and which reported on August 23, 1905, was without jurisdiction of his case. The secondary ground is that the proceedings before the latter board, even if it had jurisdiction, were arbitrary and illegal.

We contend that the board had jurisdiction, and that, having jurisdiction, its action—in view of the military character of the board and the fact that its findings have been approved by the Secretary of War and the President—is not reviewable by the courts, or, if reviewable, that no abuse of authority is shown which would justify their interference.

I.

The Board of Examination, convened August 21, 1905, had jurisdiction.

The contrary view is untenable for two reasons: First, because it does not appear, and is not alleged, that the board's report of May 24, 1905, was ever submitted to or approved by the President or the Secretary of War; and, second, because the report itself shows that it was not intended to be final or to be used as a basis for retirement.

It appears from the affidavit of General Ainsworth, which accompanied the motion to supersede the writ of certiorari and was made a part thereof, that the report of May 24 was as follows (Rec., 26):

> The board is of opinion that 2d Lieut. Winslow H. Reaves, Art'y Corps, is physically incapacitated for service *at the present time*, but that there is a reasonable hope of his recovery. Lieut. Reaves' present condition is such that it is not possible for him to proceed with the mental examination, without serious interference with his future recovery.
>
> His disability is due to severe cerebral and cardio-vascular neurasthenia, contracted in line of duty.

The position petitioner is necessarily forced to take is that the act of October 1, 1890, section 3 (26 Stat., 562), not only compels the retirement of an officer who fails in his physical examination and is found incapacitated for service by reason of physical disability, although such finding has not been approved by the President, but also that such retirement must follow although the finding of the board is simply that the officer is temporarily incapacitated. That act provides:

> SEC. 3. That the President be, and he is hereby, authorized to prescribe a system of examination of all officers of the Army below the rank of major to determine their fitness for promotion, such an examination to be conducted at such times anterior to the accruing of the right to promotion as may be best for

> the interests of the service: *Provided*, That the President may waive the examination for promotion to any grade in the case of any officer who in pursuance of existing law has passed a satisfactory examination for such grade prior to the passage of this act: *And provided*, That if any officer fails to pass a satisfactory examination and is reported unfit for promotion the officer next below him in rank, having passed said examination, shall receive the promotion: *And provided*, That should the officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in line of duty he shall be retired with the rank to which his seniority entitled him to be promoted; but if he should fail for any other reason he shall be suspended from promotion for one year, when he shall be reexamined, and in case of failure on such reexamination he shall be honorably discharged with one year's pay from the Army. * * *

In 21 Op. A. G. 385, the Attorney-General, in a case submitted by the Secretary of War requiring a direct adjudication of the point, held that an officer could not be retired by the act in question without the approval of the President. It was there said (pp. 388–389):

> It should be borne in mind that the title of this act is "An act to provide for the examination of certain officers of the Army and to regulate promotions therein." That title correctly describes the object, purpose, and intent of the act as appears from all of its provisions.

It was not an act to provide for the retirement of officers from the Army, but merely to fix the rank of officers and "regulate promotions" in the Army.

The phrase to which Lieutenant Crawford directs attention in the third proviso to section 3 of the act, "he *shall be retired with the rank to which his seniority entitled him to be promoted,*" plainly is not a mandatory provision for the *retirement* of the disabled officer, but for the purpose of fixing the rank with which he should be retired. No authority was given by law to the board of examiners for promotion to retire any officer from the Army; no such authority is anywhere given to the Secretary of War.

The law providing for the retirement of officers from the Army will be found in sections 1243–1260 of the Revised Statutes.

Section 1249 provides for the report to be made by the Army retiring board.

Section 1250 provides:

"The proceedings and decision of the board shall be transmitted to the Secretary of War, and shall be laid by him before the President for his approval or disapproval and orders in the case."

Section 1251 provides:

"When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of service, and such decision is approved by the President, said officer shall be retired from active service and placed on the list of retired officers."

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> So that no officer can be retired from the Army upon the report of any board, even if such report be approved by the Secretary of War, except it "*is approved by the President.*"

It will be observed that the act of October 1, 1890, Section 3, authorizes the President "to prescribe a system of examination of all officers of the Army below the rank of major to determine their fitness for promotion." Accompanying this brief are copies of the regulations prescribed by the President under this act, through the Secretary of War, which were in force at the time Lieutenant Reaves was examined, being General Orders No. 81 of the War Department. On page 6 of those regulations it is said:

> Any officer reported by a retiring board as incapacitated by reason of physical disability, the result of an incident of service, shall, *if the proceedings of said board are approved by the President*, be regarded as physically unfit for promotion within the meaning of section 3 of the act of October 1, 1890, and shall be retired with the rank to which his seniority entitles him whenever a vacancy occurs that otherwise would result in his promotion on the active list: *Provided*, That before the occurrence of such vacancy he shall not have been placed on the retired list.

Appellant, on page 53 of his brief, is forced to admit "that the mere report of the board did not become final until approved by the President."

But whether or not the report of May 24, 1905, was ever approved by the President, it is manifest, from

the nature of that report, that neither the board nor anyone else understood the circumstances to be such as to justify or require the immediate retirement of Lieutenant Reaves. That the statute does not require the retirement of an officer if only temporarily incapacitated seems too clear for argument.

Even where the examining board finds an officer to be permanently disabled, other conditions may arise prior to the approval of the finding and his actual retirement which may require a different disposition of his case.

Thus, the Judge-Advocate-General of the Army has held (Dig. Op. J. A. G., ed. 1901, pp. 621–622):

> 2207. Under the act of Oct. 1, 1890, c. 1241, s. 3, the finding of the board of examination that the officer is incapacitated for duty is not *per se* final, but must be reported for the action of the Secretary of War and passed upon by him. Where the finding and report of the board have been approved but not yet executed by actual retirement, there may intervene contingencies which would supersede such proceeding, as the trial and dismissal of the officer by court-martial, or the arising of new causes which might make proper that the question of his disability be inquired into by a retiring board convened under Sec. 1246, Rev. Stat. But unless some such new occasion and ground of disqualification be presented, the action of the Secretary of War, in approving the report, remains final and exhaustive, and the

officer is entitled to be retired under the act of 1890, and can not legally be ordered before such retiring board. 61, 148, 269, *August* and *September, 1893*.

2208. The act of October 1, 1890, contemplates that before an officer can be retired under it, he shall be incapacitated for active service by reason of physical disability. The existence of that fact must be ascertained before the law can be applied. If an officer is regularly found incapacitated physically by an examining board appointed under the act, but before being retired recovers from his disability, he can not legally be retired. Where such recovery is alleged a new examination is not only proper but necessary. Card 1929, *January, 1896*.

It is well settled that the construction placed upon a statute by the department of the Government charged with its administration is entitled to the greatest weight and should not be overruled except for the most cogent reasons.

United States v. *Philbrick*, 120 U. S., 52.
United States v. *Johnston*, 124 U. S., 236.
Robertson v. *Downing*, 127 U. S., 607.
Railroad Co. v. *Whitney*, 132 U. S., 357, 366.
Merritt v. *Cameron*, 137 U. S., 542.

II.

The facts stated by the petition do not show an abuse of authority by the board convened on August 21, 1905.

It is nowhere alleged or shown in the petition that the proceedings of the examining board convened on August 21, 1905, were in contravention of the regulations prescribed by the President governing such examination.

The petition merely states that petitioner's counsel was denied the right to examine the decision of the board dated May 24, 1905, and the reports of Doctor Birmingham relating to Lieutenant Reaves's condition; that he was denied the right to cross-examine the surgeons of the board who examined him at the session commencing on August 21; that the board denied his motion that the official reports of the attendants on Lieutenant Reaves's physical condition at the hospital at Fort McPherson, and on which the reports of Doctor Birmingham were based, be produced before the board, as well as "all communications, official and private, passing between Dr. Birmingham and the War Department, or any officer of the Army, and relating to the physical condition of Lieut. Reaves during the last four months," and also denied the motion of counsel "to strike out the report of the Surgeons of this date on the ground that the report of the Examining Board, dated May 24, 1905, is final, and Lieut. Reaves's retirement is mandatory under said report under the Act of Congress of October 1st, 1890." (Rec., 6–7.)

In regard to the witnesses which counsel for petitioner desired to produce, it appears that the board requested counsel to make a written statement as to what they were expected to swear to, and that the board refused to call any of them "on the ground that the doctors named had already filed certificates that were before the Board, and that the laymen were not expert witnesses." (Rec., 7–9.)

The petition further alleges that "thereupon the Board went into Executive Session, and petitioner alleges, upon information and belief, that the Board formally reported, finding your petitioner to be without any physical disqualification, and competent to take the examination and do the duty of a 1st Lieutenant of Artillery." (Rec., 9.)

There is nothing in these allegations to justify the view that the action of the board was arbitrary or illegal or constituted an abuse of authority. It appears therefrom that the petitioner, at the session of the board convened on August 21, 1905, was examined by the surgeons of the board, and that the board had before it and apparently considered all the evidence which he was able to submit by persons deemed by the board to be qualified as witnesses. Of such qualifications the board was clearly the judge.

The applicable provisions of the Regulations of the President governing the board are as follows (see General Orders No. 81, War Department, pp. 4, 5):

> * * * Medical officers shall not take part in the professional examination except in

> the cases of assistant surgeons. They shall make the necessary physical examination of all officers, and shall report their opinion in writing to the board. All questions relating to the physical condition of an officer shall be determined by the full board.
>
> If anything should arise during the examination requiring the introduction of evidence, the inquiry shall proceed upon written interrogatories as far as possible, the board determining to whom questions shall be forwarded. When, in the opinion of the board, it becomes essential to take oral testimony, the facts should be reported to the War Department for the necessary orders in regard to witnesses to be summoned from a distance. Witnesses examined orally shall be sworn by the recorder.
>
> All public proceedings shall be in the presence of the officer under examination; the conclusions reached and the recommendations entered in each case shall be regarded as confidential.

Such a board is not a judicial tribunal. Its office is to examine an officer physically and mentally, not to determine disputed questions of law or fact according to the formalities required by judicial procedure.

Petitioner does not cite any rule or regulation of the President in support of his contention that he had the right to cross-examine the surgeons of the board, and it appears from the regulations themselves that there is none. The fact that the board "went into Executive Session" has no significance, because

this appears to be the custom of the board in such cases, as petitioner makes a similar allegation with respect to the board which rendered the report of May 24, 1905, upon which he relies. (Rec., 4.)

III.

Assuming, for the sake of argument, that the rules governing the issuance of a writ of certiorari to civil tribunals would control, despite the military character of the board of examination, the authorities show that the writ was properly superseded under the facts of this case.

The primary purpose of the writ of certiorari in this District is "to determine whether an inferior court or an officer exercising judicial or quasi-judicial functions, seeking to proceed with a cause, has jurisdiction so to do."

United States v. *Mills*, 11 Appeals (D. C.), 500, 503.

The writ "cannot be made a substitute for a writ of error or to serve the purposes of an appeal."

Hendley v. *Clark*, 8 Appeals (D. C.), 165, 183.
Harris v. *Barber*, 129 U. S., 366.
Tomlinson v. *Board of Equalization*, 88 Tenn., 1.

The writ will not lie to review errors or mistakes in matters of discretion where the court has acted within its jurisdiction and where there has been no disregard by the court of the procedure prescribed by law. (6 Cyc. 756, title "Certiorari.")

Where the subordinate tribunal has jurisdiction, a strong case of abuse of discretion must be shown to justify the issuance of the writ. (*Avery* v. *Ruffin*, 4 Ohio, 420.)

In *Johnson* v. *Towsley* (13 Wall., 72, 83), which has been applied in a great many cases (7 Rose's Notes, 608), the court said:

> When the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others.

To authorize a review of the action of such a tribunal by the courts, an abuse of authority must be shown. (*United States* v. *Sing Tuck*, 194 U. S., 161, 170; *United States* v. *Ju Toy*, 198 U. S., 253, 261.) The same authorities hold that a judicial trial is not necessary to due process of law.

It is submitted that the above analysis of the facts stated in the petition do not show any abuse of authority on the part of the board convened August 21, 1905.

IV.

Interference by certiorari or otherwise with the action of a military tribunal acting within its jurisdiction, if authorized at all, should be even more guarded than in the case of civil tribunals.

The Court of Appeals of the District, finding that the board of examination convened August 21, 1905, had jurisdiction, held that the character of the board and

the fact that its findings were subject to the approval of the President precluded further inquiry. (Rec., 29, 32.)

Even if it should be held that a military board of examination differs from a court-martial, whose acts within its jurisdiction are not subject to review by the courts (*Johnson* v. *Sayre*, 158 U. S., 109, 118, and cases cited), it is manifest that public policy requires that the action of such boards should not be disturbed except for the most cogent reasons.

In *People ex rel. Smith* v. *Hoffman* (166 N. Y., 462), the Court of Appeals of New York merely held that the courts of that State had the power to issue a writ of certiorari to review the action of an examining board of the State militia, military tribunals not having been expressly excepted from the operation of the general grant of authority contained in the State code. The court, however, recognized a distinction between the Regular Army and the State militia in this respect. It said (pp. 473–4):

> It may be claimed, however, that the determination of military tribunals, although not expressly excepted from the provisions of the Code relating to the right of certiorari, are impliedly excepted, because if civil courts were permitted to interfere with the judgments of military courts the discipline of the National Guard might be injured. There is force in this argument, which is confirmed to a certain extent by the decisions of the Federal courts relating to the regular army, and by some,

but not by all, writers on military law. The subject, however, is treated with reference to a standing army rather than the militia of the various states. (*Dynes* v. *Hoover*, 61 U. S., 65, 81; *Ex parte Milligan*, 71 U. S., 2; *Johnson* v. *Sayre*, 158 U. S., 109; 1 Winthrop's Mil. Law, 55; De Hart's Mil. Law, 226; Maltby's Treatise on Courts-Martial, 151,158; O'Brien's American Mil. Law, 222; Davis' Mil. Law, 6.) There is a conflict of authority between the courts of the different states as to the right of the civil courts to review the judgments of military tribunals. (*Durham* v. *U. S.*, 4 Hayw. [Tenn.], 54; *State* v. *Davis*, 4 N. J. L., 311; *Ex parte Dunbar*, 14 Mass., 393; *Re Contested Election*, 1 Strobh. [S. C.], 190; 4 Encyclo. Pl. & Pr., 40.) The courts of England review such judgments, but cautiously, as the subject requires. (*Grant* v. *Gould*, 2 H. Black., 69, 101; *In re Mansergh*, 1 Best. & Smith, 400; 1 Winthrop M. L., 57; *In re Poe*, 5 Barn. & Ad., 681.)

Confining the discussion to times of peace, as in time of war military necessity may sanction the temporary exercise of almost any power to save the state, there is a wide distinction between the regular army of the nation and the militia of a state when not in the service of the nation, for discipline which is ample for the latter will not answer for the former. A member of the state militia belongs to civil life, has a civil avocation, and only occasionally engages in the exercise of arms. A member of the United States army,

> on the other hand, has no employment except that of a soldier and arms constitute the business of his life. Hence, more rigid rules and a higher state of discipline are required in the one case than in the other.
>
> Moreover, the state militia is organized by statutes of the state, and the legislature, under the limitations of the Constitution, has power to regulate the entire subject, to invest boards of examination with such authority, and to give the civil courts such power to review as it sees fit. When, therefore, the legislature issued a general command upon the subject of reviewing the action of inferior judicial tribunals and officers acting judicially and made certain exceptions thereto, the matter was exhausted and the courts have no power to add an exception relating to any tribunal which the legislature is presumed to have had in mind.

A like distinction between the Regular Army and the militia in time of peace is recognized by the Fifth Amendment to the Constitution in the case of the trial of crimes.

We submit that the Court of Appeals of New York was right in its view that "more rigid rules and a higher state of discipline are required" in the Regular Army than in the militia, and that in view of this fact the courts should be extremely reluctant to interfere in a matter within the jurisdiction of a military tribunal, especially where, as here, its action is subject to review by the President.

Moreover, it will be observed that the facts presented by the petition in *People ex rel. Smith* v. *Hoffman* are materially different from those at bar. There the petition showed that the relator was denied counsel and also a hearing. The first meeting of the board was adjourned with the promise that the relator would be notified of its next session, at which he would have an opportunity to be heard, but no such session was ever held, and the relator was thereafter discharged upon the adverse report of the board. Here, it appears that Lieutenant Reaves had counsel, was duly examined, the evidence deemed admissible in his behalf considered, and, for aught that appears in the petition, he received just such a hearing as was required by the regulations of the President under the act in question.

The fact, suggested by counsel for plaintiff in error (brief, p. 56) that the militia latterly has been more nearly assimilated to the Regular Army is simply a reason why the courts should be more careful in exerting jurisdiction over that branch of the military service, not an argument in favor of a greater exercise of authority over the Regular Army.

It is respectfully submitted that the board which convened August 21, 1905, had jurisdiction of the case of Lieutenant Reaves; that no abuse of authority or disregard of the regulations established by the President governing such boards is shown, and, its action having presumably been approved by

the Secretary of War and the President, in view of the fact that Lieutenant Reaves was honorably discharged from the service with one year's pay as provided by the statute, that the writ of certiorari was properly superseded.

The judgment of the Court of Appeals should therefore be affirmed.

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